Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

MARY LOU SMITH,

Petitioner,

v.

HONORABLE ANDREW N. FRYE, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was fired from her state government position because her supervisor, the Chief Judge, was angry that her son had filed to run against the incumbent circuit clerk in the primary election and because he believed that Ms. Smith supported her son's candidacy rather than that of the incumbent. The Fourth Circuit held that this type of political firing was not protected by the First Amendment.

1. Whether the First Amendment protection recognized from political firings first articulated in *Elrod v. Burns*, 427 U.S. 347 (1976), is limited to political firings that either [a] occur during post-election "housecleaning" or [b] are effected by the candidate himself, rather than by his political ally?

2. Whether a public employee's right to be free from politically-motivated termination was sufficiently "clearly established" to overcome a supervisor's qualified immunity defense where the public employee was fired for supporting a challenger to an incumbent office holding in the primary election and where there was no judicial decision that specifically addressed whether the specific job, West Virginia magistrate court clerk, was non-political?

3. Whether the First Amendment and F.R.C.P. Rule 12(b)(6) permit a federal court to dismiss a complaint that unambiguously alleges that public employment was terminated for political reasons, based on the court's belief that the employer may have been acting for other, constitutionally permissible reasons?

PARTIES TO THE PROCEEDINGS

The petitioner in this case is Mary Lou Smith. Greg Smith was also a party to the proceedings below, but he is not seeking a writ of certiorari. The respondent is Andrew N. Frye, Jr., a judge of the Circuit Court of Mineral County, West Virginia.

RULE 29.6 STATEMENT

In accordance with United States Supreme Court Rule 29.6, petitioner states that she has no parent companies or non-wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mary Lou Smith, a former clerk of the Magistrate Court of Mineral County, West Virginia, was fired by her employer, the Chief Judge of the Circuit Court of Mineral County and the respondent herein, in retaliation for her son's candidacy opposing the incumbent circuit clerk in the Republican primary election and his belief that she supported her son's candidacy rather than that of the incumbent. She seeks review of the Fourth Circuit Court of Appeals' decision upholding the dismissal of her political firing case based on its conclusion that political firings are not prohibited by the First Amendment unless the employee was either terminated by a candidate in the heat of a campaign or as part of a post-election house-cleaning. By restricting the First Amendment's prohibition on political firings exclusively to these two categories, the Fourth Circuit's holding conflicts with well-established legal principles articulated by this Court and other federal appellate courts over the past thirty years.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Smith v. Frye*, 488 F.3d 263 (4th Cir. 2007). Appendix ("App.") A, 1a-25a. The Fourth Circuit's denial of the petition for rehearing and rehearing *en banc* is unreported. App. B, 26a. The unpublished opinion of the district court is reported at *Smith v. Frye*, 2006 U.S. Dist. LEXIS 39909 (N.D. W. Va. Jun. 14, 2006). App. C, 27a-46a.

JURISDICTION

The court of appeals denied the petition for rehearing and rehearing *en banc* on June 15, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in relevant part that "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

The statute under which Ms. Smith brought her claim, 42 U.S.C. § 1983, reads, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

STATEMENT OF THE CASE

A. Ms. Smith's Termination

This case involves the political firing of petitioner, Mary Lou Smith, an at-will state judicial employee.[1] Ms. Smith was

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[1]The Complaint included the claims of both Ms. Smith and her son, Greg Smith. App. D, 47a-54a. The Fourth Circuit

fired by Andrew N. Frye, Jr., a state court judge, from her position as magistrate court clerk because her son had filed to run for office in the 2004 primary election against the incumbent circuit clerk and because Judge Frye believed that Ms. Smith supported her son's candidacy against the incumbent.[2] App. 48a-49a, (Compl. ¶¶ 8, 10-13). Judge Frye announced his intent to fire Ms. Smith to his judicial colleague, Judge Phillip B. Jordan, Jr., on the very same day that her son, Greg Smith, filed his candidacy papers. App. 48a-49a (Compl. ¶¶ 10, 12-13).[3] Judge Frye was angry at Ms. Smith and expressly told Judge Jordan that he was going to fire Ms. Smith because of her son's candidacy. App. 50a (Compl. ¶ 24).

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dismissed both claims pursuant to the Respondent's Motion to Dismiss under Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. However, only Ms. Smith petitions this Court for a writ of certiorari.

[2]The circuit clerk does not have any supervision over or other direct employment relationship with the magistrate clerk. App. 48a (Compl. ¶ 11).

[3]This case involves a dismissal based on a Rule 12(b)(6) motion to dismiss. Thus, the allegations in the Complaint are to be taken as true. The Fourth Circuit majority opinion incorrectly states that Judge Frye did not tell Judge Jordan that he intended to fire Ms. Smith because of her son's candidacy until several days later. App. 3a. *See* App. 48a-49a (Compl. ¶ 12-13) (alleging "On January 30, 2004, shortly after learning that Greg Smith had filed to run for circuit clerk, the defendant, Judge Frye, told Judge Philip B. Jordan, Jr., the other judge of the 21st Judicial Circuit, that he wanted to fire Ms. Smith because her son had filed to run for circuit clerk. At the time that the defendant told Judge Jordan of his intent to fire Ms. Smith, the defendant, according to Judge Jordan, was angry at Ms. Smith because of her son's candidacy for the position of circuit clerk.").

Despite Judge Jordan's efforts to dissuade Judge Frye from his intended course of action, Judge Frye went ahead and fired Ms. Smith less than one week later because he believed that she supported her son's candidacy and not that of the incumbent circuit clerk. App. 49a (Compl. ¶¶ 16-18). Prior to her termination, no one, including Judge Frye, had complained about Ms. Smith or her work and she was widely respected by everyone with whom she worked. App. 49a (Compl. ¶¶ 14-15).

After she was fired, Ms. Smith filed for a personnel hearing under the administrative appeal procedures of the West Virginia judicial system.[4] Instead of offering an explanation at the hearing for his decision to fire Ms. Smith, Judge Frye refused to identify a reason for his decision, insisting that he did not have any reason or motive for firing her. App. 50a (Compl. ¶ 26).[5] He further testified, untruthfully, that he had been planning to fire Ms. Smith before he learned of her son's candidacy. He sought to support this assertion by stating that he had requested a model termination letter from the

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[4]The administrative appeal was filed pursuant to the personnel policies of the West Virginia Supreme Court of Appeals for judicial employees. App. 49a-50a (Compl. ¶¶ 19-22).Ms. Smith's federal claims are not precluded by the doctrines of *res judicata* and collateral estoppel because this was an internal proceeding administered by the West Virginia Supreme Court of Appeals in its capacity as an employer, not within its judicial capacity. App. 51a-52a (Compl. ¶¶ 36, 38).

[5]In its statement of the pertinent facts of the case, the Fourth Circuit speculated that: "Judge Frye expressed concerns over potential conflicts of interest and the proper functioning of the local judicial system created by the combination of Ms. Smith's employment and her son's candidacy." App. 3a. However, at no point in this case has Judge Frye, himself, sought to justify his decision to terminate Ms. Smith on these grounds.

Administrative Office of the West Virginia Supreme Court of Appeals three to four weeks before he fired Ms. Smith. App. 50a (Compl. ¶ 27). However, James Albert, Interim Director of the Administrative Office, contradicted this assertion and testified at the hearing that, according to his records, Judge Frye did not contact him until five days after Greg Smith filed his candidacy papers and one day before Judge Frye fired Ms. Smith. App. 50a-51a (Compl. ¶ 28). Although the hearing officer, a senior status judge, concluded that Ms Smith would not have been discharged had her son not become a candidate for the office of circuit clerk, he incorrectly concluded that Ms. Smith's termination did not violate state or federal law. App. 51a (Compl. ¶ ¶ 29-30).

B. Proceedings before the District Court

Ms. Smith filed suit against Judge Frye in the United States District Court for the Northern District of West Virginia, pursuant to 42 U.S.C. § 1983, seeking damages for her wrongful termination.[6] She contended, in relevant part, that Judge Frye had fired her, in violation of her rights under the First and Fourteenth Amendments, because her son, Greg Smith, had filed to run against the incumbent circuit clerk in the Republican Party primary and because the defendant believed that Ms. Smith supported her son, not the incumbent circuit clerk. App. 49a, 53a (Complaint ¶ ¶ 18, 45).

Judge Frye moved to dismiss Ms. Smith's claims, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, contending that she had failed to plead a claim upon which relief can be granted. The district court dismissed Ms. Smith's federal claims because, in the court's words, she failed

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[6]For reasons not at issue here, Ms. Smith chose not to seek injunctive relief against the state judiciary.

to allege that "she took any action to support her son's candidacy, or that she exercised rights granted to her under the United States Constitution whatsoever" and such failure was fatal to her claims. App. 39a. Thus, rather than following the teaching of *Branti v. Finkel*, 445 U.S. 507 (1980), that the First Amendment protects a public employee's rights of belief and association, the district court ignored Ms. Smith's freedom of association claim and analyzed her claim solely as a freedom of speech case. As a result, the court mistakenly concluded that her case could not go forward in the absence of an allegation that she had engaged in active support for her son's candidacy prior to her termination.[7]

C. Proceedings before the Fourth Circuit Court of Appeals.

Ms. Smith appealed to the Fourth Circuit, contending that the district court had erred in holding that, under 42 U.S.C. § 1983, she was required to show she had engaged in overt action supporting her son's candidacy in order to survive the respondent's motion to dismiss. The Fourth Circuit acknowledged that the district court had failed to consider Ms. Smith's First Amendment freedom of association claim. App.

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[7]Although Ms. Smith did not engage in any activity demonstrating her support for her son's candidacy before she was fired, Ms. Smith alleged that Judge Frye had told a fellow judge that he was going to fire her because her son had filed to run for the office of circuit clerk. App. 48a-50a (Compl. ¶ 12-13, 24). Judge Frye knew that Greg Smith was her son and, consequently, assumed that she was affiliated with and supported his candidacy. Accordingly, Ms. Smith also alleged that Judge Frye fired her because he believed that she supported her son's candidacy. App. 48a-49a (Compl. ¶¶ 10-13, 18).

6a.[8] However, it then upheld the district court's decision on grounds that were neither addressed by the parties in their briefs nor at oral argument. In dismissing Ms. Smith's association claim under *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), and their progeny, the panel majority (Judges Duncan and Niemeyer) articulated a novel and narrow interpretation of the prohibition against political firings afforded by the First Amendment by restricting its application to *only* two categories of political firings: discharges during a "victory housecleaning" and discharges by a candidate himself "in the heat of his own campaign." App. 14a-15a. Judge Motz dissented from this ruling, although she concurred in the judgment on the grounds of qualified immunity.

Specifically, the panel majority concluded that the constitutional principle articulated in *Elrod* and *Branti* only applied to two specific situations. In reaching this conclusion, the Court first noted that *Elrod* cases fell within two categories:

> In this circuit, *Elrod* cases have fallen into two primary archetypes: (1) cases in which the person being fired is actively associated with a political party or faction (or actively chooses not to be so associated) and the individual making the firing decision is a person seeking office; or (2) cases in which newly elected or appointed officials fire supporters of their rivals during a political transition.

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[8]The Fourth Circuit accuses Ms. Smith of having "vague," "evolving" and "mutating" legal theories, suggesting that she did not rely on her right to freedom of association in the district court. *See* App. 4a, 7a n.2. To the contrary, Ms. Smith had argued that her First Amendment claim was based on her freedom of association before the district court but the district court failed to address this issue in its decision.

App. 9a (internal citations omitted). The Fourth Circuit then decided that these "archtypes" were the *only* political firings prohibited by the First Amendment, concluding that Ms. Smith cannot prevail because "Judge Frye was not himself seeking office and terminating those who did not support his candidacy" "[n]or was Judge Frye cleaning house after an electoral victory." App. 13a.

In reaching its conclusion that political firings other than those that fell within the two identified categories were not prohibited by the Constitution, the opinion failed to explain how or why *Elrod* or *Branti* mandated this restrictive approach to First Amendment rights of political association and affiliation. The opinion also failed to explain why the First Amendment prohibits firing a public employee *after* an election for supporting a disfavored candidate but does not prohibit firing the same employee for the same reason *before* the election. Nor did the opinion offer any explanation as to why it thought that *Elrod* or *Branti* prohibited a candidate for political office from firing a public employee in the midst of his campaign because the employee failed to support him, but permitted the candidate's government colleagues to fire a public employee for the identical reason.

Although the opinion sought to characterize Ms. Smith's claim as leading the court far afield because she had not alleged that she actively supported her son's candidacy, it ignored the fact that Ms. Smith had specifically alleged Judge Frye told one of his colleagues that he intended to fire Ms. Smith *because he believed that she supported that candidacy.*[9] App. 12a. Thus,

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[9]Ms. Smith's allegations were not based on inferences from unsupported facts but were based on actual testimony in the personnel hearing. Moreover, when given the opportunity to disagree with Ms. Smith's contention that she was fired because

Ms. Smith's claim lies at the very heart of the constitutional prohibition on political firings.

Judge Motz dissented from the panel majority's constitutional ruling.[10] She faulted the majority for failing to properly credit the allegations in the complaint. As she explained in her opinion, concurring in the result, Ms. Smith's allegations that Judge Frye terminated her employment because her son had filed to run against the incumbent Circuit Clerk in the Republican primary and because Judge Frye believed that she supported her son and not the incumbent circuit clerk, when

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Judge Frye believed that she supported her son's candidacy, Judge Frye refused to provide an alternative reason or, for that matter, any reason at all, insisting that he fired Ms. Smith for no reason. *See* App. 50a (Compl. ¶ 24-26) ("At the administrative hearing, Judge Jordan, who was called as a witness by Ms. Smith, testified that the defendant said that he was going to fire Ms. Smith because her son had filed to run in the primary election against the incumbent Circuit Clerk. The defendant did not disagree with Judge Jordan's testimony about what he, the defendant, had said. Instead, the defendant testified that he did not recall the details of his conversations with Judge Jordan. When the defendant was asked why he fired Ms. Smith, he did not provide a reason for his decision, insisting, instead, that he did not have a reason or a motive for his decision to fire her.").

[10] Unlike her fellow panelists, Judge Motz concluded that Ms. Smith had alleged facts sufficient to state a claim against Judge Frye for his violation of her First Amendment rights. App. 19a-24a. However, Judge Motz concurred in the judgment because she further concluded that the applicability of the First Amendment to facts like those alleged was not clearly established at the time that Judge Frye fired Ms. Smith and, thus, he would be entitled to qualified immunity. App. 24a-25a.

properly viewed in the light most favorable to the plaintiff, set forth a strong First Amendment claim. App. 21a.

> When read in the best light for Ms. Smith, her complaint alleges that Judge Frye used the power of the state to punish Ms. Smith for her political affiliation and/or views. Rather than being "attenuated," this claim sounds in the heart of the First Amendment. *See West Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642, 62 S.Ct. 1178, 87 L. Ed. 1628 (1943) ("If there is any fixed star in our constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . . or other matters of opinion . . . .").

App. 22a-23a, n.*.

The Fourth Circuit's ruling takes two common fact patterns in which public employees are fired in violation of their constitutional right to freedom of association and holds that they are the exclusive fact patterns entitled to protection under *Elrod* and *Branti*.[11] App. 14a-15a. Yet, it never explains *why* the First Amendment's protection of political freedom should be so artificially limited. As Judge Motz recognized, this is constitutional error.

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[11]This error in analysis also led the court to err in its analysis of the qualified immunity issue. Instead of focusing on whether Judge Frye should reasonably have understood that, as a public official, he could not fire an employee because he disapproved of the candidate she supported, the majority and concurring opinion inquire whether there was a previous case that specifically dealt with such a pre election firing. Yet, the issue is not whether there was a previous case directly on point, but whether a reasonable public employee, let alone a judge, should have known that firing someone solely for political reasons was prohibited by the First Amendment.

REASONS FOR GRANTING THE PETITION

This Court's review is necessary because the Fourth Circuit's decision limiting the constitutional protections against political firings is inconsistent with over thirty years of First Amendment jurisprudence developed by the federal courts since *Elrod v. Burns*, 427 U.S. 347 (1976). Through *Elrod*, *Branti* and their progeny, the courts have developed a commonly understood rule that the firing of public employees for purely political reasons is prohibited by the First and Fourteenth Amendments unless political loyalty, compatibility or affiliation is an appropriate requirement for the position.[12]

Contrary to the suggestion in the Fourth Circuit's opinion, Ms Smith is not attempting to extend the principles of *Elrod* to a new type of case. Rather, her case involves a classic political firing. She was fired because a public official disapproved of her son's candidacy and believed that she supported her son rather than the incumbent. Although this fact pattern may not conform to the "archetypes" identified by the Fourth Circuit, nothing in *Elrod* or in the reasoning of the cases

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[12]Judge Frye never contended that political loyalty, compatibility or affiliation was an appropriate requirement for Ms. Smith's position at the time he fired her, at the personnel hearing or in his Motion to Dismiss. At this point in the litigation, there is no basis in the record to support a conclusion that the position of magistrate court clerk was an exception to the general rule against political firings. *See Caudill v. Hollan*, 431 F.3d 900, 908 (6th Cir. 2005) (noting that after a plaintiff has made a prima facie case that he was discharged because of his political affiliation, the burden shifts to the defendant to demonstrate that the plaintiff's job was one for which political affiliation was an appropriate requirement).

following it suggests that *Elrod* rights are limited to those types of political firings that are statistically the most common. No other appellate circuit has sought to restrict a non-policymaking public employee's First Amendment associational rights in this way. Nor does the Fourth Circuit point to any principle that would justify restricting political firing cases to those fact patterns that most commonly result in litigation.

The Fourth Circuit has now effectively authorized undisguised political firings within its jurisdiction so long as they are made before the election and by someone who is not running for office at the time. In the Fourth Circuit, public employees who choose not to support the primary or general election candidates favored by their supervisors or who support or are perceived to support rival disfavored candidates will no longer enjoy the protections provided by *Elrod* and its progeny. As a result, the Fourth Circuit's ruling significantly weakens the protections of the First Amendment by allowing political allies of a candidate to fire public employees who do not support that candidate prior to an election.

A. The Court Should Grant Review to Resolve the Conflict Created by the Fourth Circuit's Decision and to Clarify the Prohibition on Political Firings.

1. The Fourth Circuit's Decision Conflicts with Well-established First Amendment Jurisprudence in this Court and in Other Circuits.

Mary Lou Smith does not seek an extension of established law. To the contrary, although the exact pattern of this case has not been reported in other cases, the language and analysis of other courts indicate that her claims would have been allowed to proceed other circuits. Neither this Court nor any other circuit court of appeals known to the plaintiff has ever

adopted the restrictive view of *Elrod* that is now the law in the Fourth Circuit.

The right of ordinary public employees to associate with the party or faction of their choice as well as the right to support the candidate of their choice is a well recognized constitutional right and a commonly understood principle of our political culture. In *Elrod v. Burns*, 427 U.S. 347 (1976), this Court first recognized that the termination of a public employee violates the First Amendment if the termination is based on the employee's political affiliation or non-affiliation. Subsequently, in *Branti v. Finkel,* this Court elaborated on the protections extended to public employees under the First Amendment, stating:

> If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes. Under this line of analysis, unless the government can demonstrate an overriding interest of vital importance, requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.

445 U.S. 507, 515-516 (1980) (internal citations to *Elrod* omitted).

A decade later, in *Rutan v. Republican Party*, this Court held that the principles developed in *Elrod* and *Branti* also applied to promotion, transfer, recall, and hiring decisions based on party affiliation and support. 497 U.S. 62 (1990). Finally, this Court extended the First Amendment protection afforded public employees to independent contractors. *O'Hare Truck Serv. v. City of Northlake,* 518 U.S. 712, 714-15 (1996) ("Although the government has broad discretion in formulating

its contracting policies, we hold that the protections of *Elrod* and *Branti* extend to an instance like the one before us, where government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance.").

Although *Elrod* and *Branti* addressed political patronage systems, the language and logic of the opinions and subsequent decisions in the circuit courts of appeal have developed the law on political firings, holding that the principles articulated in these cases apply where a public employee is fired for supporting or failing to support a particular candidate in an election. *See, e.g., Sowards v. Loudon County*, 203 F.3d 426 (6th Cir. 2000) (holding that firing a jailer for supporting her husband's campaign for sheriff violated her right of political association and her right to intimate association with her husband); *Durant v. Independent Sch. Dist. No. 16*, 990 F.2d 560 (10th Cir. 1993) (upholding jury verdict on school employee's claim that she was terminated in retaliation for supporting rival candidate for the Board of Education); *Snyder v. City of Moab*, 354 F.3d 1179, 1184-85 (10th Cir. 2003) (noting that the First Amendment protects public employees from discrimination based upon their political beliefs, affiliation, or non-affiliation and that "[t]his protection is violated, and a valid § 1983 claim may be asserted, where a public employee is discharged because of his or her position regarding a particular candidate for office except where the public employee is in a position requiring political allegiance.").

The prohibition on political firings is no different when the firing results from the failure to support a particular faction within the same political party or from an employee's support or non-support of a particular candidate in a primary election. *See, e.g., Curinga v. City of Clairton*, 357 F.3d 305, 311 (3d Cir. 2004) (noting that "[p]rimary election fights can be famously

brutal, sometimes more so than contests in the general election"); *Padilla-Garcia v. Rodriguez*, 212 F.3d 69, 76 (1st Cir. 2000) ("Clearly factions within one party can represent different political philosophies. Thus, the underlying principle, freedom to express political beliefs, is very much still at stake. In a case such as this one, where there is a heated battle during the primary, the risk of retaliation against an employee who supported the opposition is just as high as in any other election."); *Robertson v. Fiore*, 62 F.3d 596, 600 (3d Cir. 1995) (explaining that "[b]ecause of the dominance of one political party in some locations, intraparty battles will sometimes overshadow interparty battles"); *id.* ("The danger that employees will abandon the expression or exercise of their political beliefs to appease their supervisors is not diminished because a supervisor supports a different identifiable faction within a party as compared to a different party altogether."); *Tomczak v. Chicago*, 765 F.2d 633, 640 (7th Cir. 1985) (concluding that the reasoning of *Branti* "applies with equal force to patronage dismissals when one faction of a party replaces another faction of the same party."); *Barnes v. Bosley*, 745 F.2d 501, 506 (8th Cir. 1984) (agreeing with district court that political motives prompted dismissal even though litigants were members of same party).

Moreover, the First Amendment protects the right of a public employee to remain politically neutral as well as to support a particular candidate or party. *See, e.g., Galli v. N.J. Meadowlands Comm'n*, 490 F.3d 265, 276 (3d Cir. 2007) ("We hold that the First Amendment protects politically neutral or apolitical government employees from political patronage discrimination."). Nor does it matter whether the employee's political belief is privately held or publicly expressed. *See, e.g., Bass v. Richards*, 308 F.3d 1081, 1090 (10th Cir. 2002) ("It is also clearly established that the First Amendment prohibits the

dismissal of an employee because of his privately held political beliefs.").

Thus, consistent with *Elrod* and *Branti*, the federal courts have held that firings and other retaliatory employment actions are prohibited where the employer's action is based upon the employee's political affiliation and/or support or non-support for a particular candidate. Moreover, a public employee is not required to affirmatively support a candidate in order to be protected from political retaliation because, as set forth in *Branti*, an employee's private political beliefs fall within the protection of the First Amendment. 445 U.S. at 516-17 (stating that "the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs").

Therefore, the Fourth Circuit's decision in this case, construing the *Elrod* doctrine as limited strictly to two specific factual applications, is in conflict with the understanding of that doctrine articulated by other circuits. Prior to the decision in this case, no court, to petitioner's knowledge, has ever concluded that the First Amendment jurisprudence of *Elrod, Branti* and *Rutan* would not apply where a public official fires an employee because he believes she supports the opponent of one of the official's political colleagues in an election. Nor has any court suggested that the protection from being fired for political association, political affiliation or political belief is somehow limited to post-election firings. Nor have other courts concluded that an employee is protected from a political firing *only* if the person doing the firing is the candidate himself. It is hard to imagine any principle that would justify such distinctions. Nonetheless, those are precisely the distinctions made by the Fourth Circuit in this case.

The Fourth Circuit's decision, therefore, creates a precedent that undermines decades of First and Fourteenth

Amendment jurisprudence and effectively creates a play book of judicially approved political firings. Under this decision a public official can summarily discharge any public employee who refused to support the official's favored candidate or slate of candidates so long as this is done before an election. Similarly, a public official can summarily order the firing of any public employee whose family member– or business associate, or friend – has the temerity to run for political office against one of the public officials's political associates or friends.[13]

Consequently, this decision will inevitably have a chilling effect on public employees whose political preferences and/or choice of candidate differs from their public employer. The decision creates a political patronage regime in the Fourth Circuit that is contrary to the decisions of this Court and inconsistent with the decisions of the other federal circuits.

2. The Fourth Circuit's Reasons for its Decision Are Inconsistent with the Reasoning of the Applicable Precedents.

As noted above, Ms. Smith has not sought to extend the scope of *Elrod's* protection. To the contrary, the Fourth Circuit has artificially restricted that protection and, in doing so, invited public officials to engage in political firings so long as those firings occur before election day and are ordered by someone other than the candidate himself. Most importantly, the Fourth Circuit did not reach this conclusion by analyzing the constitutional principles of the *Elrod* line of cases. Instead, as noted above, it simply looked at the common fact patterns of

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[13]Although this case involves a retaliatory political firing by a state judge, the holding in the panel majority's decision will apply equally to officials within the executive and legislative branches of government.

previous cases and then concluded, without any basis in First Amendment jurisprudence, that First Amendment protections are somehow limited to situations that fit those fact patterns.

In turning a survey of prior cases into a restriction on First Amendment rights, the court failed to consider that Ms. Smith's case alleges an egregious violation of First Amendment associational rights. There is no ambiguity in the case alleged in her complaint. She was fired intentionally for the specific reason that her employer disapproved of her presumed support for a candidate who opposed one of his local government colleagues in a primary election. The fact that a similar firing has not previously resulted in a reported case in the Fourth Circuit does not make the firing constitutional. Nor is there any reason to believe that the cases which most frequently find their way into reported opinions represent the most egregious affronts to the First Amendment. In fact, the most egregious cases are more likely to settle early and never wind up in an appellate opinion. In any case, the right at issue is not based on the number of identical fact patterns that have been litigated in the past. It is based on the logic of the First Amendment which, since *Elrod*, prohibits political firings.

In fact, Ms. Smith's firing is, if anything, more clearly in violation of *Elrod* and *Branti* than many of the reported cases. She was singled out because her employer believed she supported the wrong candidate in a primary election. No public official should need a case on point to tell him that such a firing is unconstitutional. Further, it is difficult to conceive of a logical reason why any public official, let alone a judge, would have thought it was lawful to fire an employee because he disagreed with her choice of candidate so long as he did it before election day.

The panel majority's decision is illogical for another reason. A victory housecleaning occurs when challengers successfully oust the incumbent party or faction in an election and gain the right to hire and fire. Incumbents, however, do not need to wait for an electoral victory to reward supporters and punish those who fail to support their approved candidates. Thus, by limiting *Elrod*'s protections to only those terminations that occur during a "victory housecleaning" and by the candidate himself "in the heat of his own campaign," the Fourth Circuit effectively sanctions retaliatory firings and other retaliatory employment actions by an incumbent party or political faction to enforce support for their candidates or slate of candidates so long as those retaliatory actions occur prior to the election.

Moreover, the fact that Judge Frye was not running for political office is irrelevant to the analysis. *Elrod* addressed the problem of political firings in the context of political machines. Where a political machine has power, the individual who enforces political conformity among employees is not necessarily the candidate himself. The dangers that *Elrod* and *Branti* addressed involve invasions of political freedoms by the employer regardless of whether the employer himself is actually running for political office.

Finally, the Fourth Circuit reasons that "[e]xtending *Elrod* to Ms. Smith's claim would require courts to undertake subjective factfinding inquiries into government officials' actual motivations in making at-will employment decisions to a greater extent than and in contexts in which this court has never ventured." App. 14a. However, courts have regularly engaged in "inquiries into governmental officials' actual motivations" in many contexts for many years. *See, e.g., Knight v. Vernon*, 214 F.3d 544, 551-552 (4th Cir. 2000) (rejecting summary judgment and remanding case for trial on plaintiff's claim that she had been fired for political reasons); *Peacock v. Duval*, 694 F.2d 644,

646 (9th Cir. 1982) (stating, in a First Amendment retaliation claim, that "[w]ithout a searching inquiry into these motives [for the employment decision], those intent on punishing the exercise of constitutional rights could easily mask their behavior behind a complex web of post hoc rationalizations."). The potential difficulty of factfinding in some future case is not a reason to avoid applying the First Amendment in this case where the facts are clear.

B. The Fourth Circuit's Conclusions Regarding Qualified Immunity Are Inconsistent With the Law as Developed in this Court and Other Circuit Courts and Will Unnecessarily Increase the Litigation of Qualified Immunity Issues in Political Firing Cases.

1. The Fourth Circuit Erred in Holding That Judge Frye Was Entitled to Qualified Immunity.

This is not a case where the constitutional error is harmless. The Fourth Circuit has held that it is lawful to fire a public employee because the employer disapproves of the candidate he believes she supports. In reaching that clearly erroneous conclusion, the Fourth Circuit has not only sanctioned political firings, but also expanded the use of qualified immunity for conduct that, prior to this decision, reasonable public officials would have understood to violate *Elrod* and *Branti*.

The Fourth Circuit repeats the same mistake it made in analyzing the scope of protection under *Elrod* and then compounds that problem by adopting an overly restrictive approach to qualified immunity in cases of this type. Thus, although Judge Frye was on fair notice that firing a public employee for political reasons violated a clearly established constitutional right, the Court nonetheless concluded that he was

entitled to qualified immunity because there was no prior case that specifically addressed the exact facts presented in this case. App. 12a.[14] However, the Fourth Circuit's qualified immunity analysis is inconsistent with the analysis applied by this Court and the other federal circuits and, as discussed below, undermines the First Amendment protections articulated in *Elrod* and its progeny.

The doctrine of qualified immunity is not intended to require a plaintiff to demonstrate that the exact conduct at issue has been identified as unconstitutional in a prior case. Rather, public officials are expected to interpret the contours of the right at issue reasonably. As this Court stated in *Anderson v. Creighton*:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful*; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

483 U.S. 635, 640 (1987) (omitting internal citation) (emphasis added). *See also Hope v. Pelzer*, 536 U.S. 730 (2002) (noting that where the constitutional violation was 'obvious' that there need not be a materially similar case for the right to be clearly established).

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[14]Although Judge Motz concurred in the judgment on the grounds that Judge Frye would be entitled to qualified immunity, she offered no legal analysis for her conclusion. App. 25a.

Moreover, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.*, at 741. As the Sixth Circuit has noted,

> Were this court to require position-specific findings before it found that the law was clearly established, *we would be, in effect, requiring a previous finding on the constitutionality of patronage dismissals for every government position before holding that the law was clearly established for that position.* Such a finding could lead to the result that similarly situated county officials could engage in political patronage dismissals at least once with impunity, unless and until a court ruled on the constitutionality of political patronage for that particular position. Such a result is not warranted by logic or precedent.

Caudill v. Hollan, 431 F.3d 900, 913-14 (6th Cir. 2005) (emphasis added). Thus, the pertinent legal inquiry is whether the law "is sufficiently defined so as to provide public officials with 'fair notice' that the conduct alleged is prohibited." *Epps v. Watson,* 492 F.3d 1240 (11th Cir. 2007) (citation omitted).

In the present case, other circuit courts of appeal would likely have concluded that Judge Frye was, in fact, on "fair notice" that firing Ms. Smith because he thought she supported her son against the incumbent circuit clerk was unlawful. As alleged in the complaint, Judge Frye specifically intended to fire Ms. Smith because he believed she supported her son instead of the incumbent circuit clerk. In light of *Elrod, Branti, Rutan,* and other political firing cases, no reasonable official could conclude that such a firing was permissible under the First Amendment because the exact fact pattern had not been litigated in a reported case. Nor could a public official, knowing that it was unlawful to fire a public employee for her support of a disfavored

candidate in a post-election house-cleaning, reasonably believe that it was legal to do the same thing in a pre-election purge. Nor could a public official knowing that the incumbent circuit clerk could not fire her subordinates if they did not support her reelection efforts reasonably believe that he could fire his own subordinates if they failed to support his political colleague.

Moreover, the facts of this case indicate that, contrary to the Fourth Circuit's speculation, Judge Frye himself understood quite well that his conduct was illegal. As discussed above, when given the opportunity to provide a lawful, non-retaliatory reason for firing Ms. Smith at the personnel hearing, Judge Frye disingenuously insisted that he had no reason for firing her at all. App. 50a (Compl. ¶ 26).

Finally, the panel majority states that Judge Frye is also entitled to qualified immunity because it was not clearly established "that Ms. Smith's position is a protected one, rather than one for which political affiliation is a legitimate job requirement." App. 14a-15a n.6.[15] However, such a ruling was premature as this case was decided on a motion to dismiss based upon the pleadings. Furthermore, qualified immunity is an affirmative defense and, thus, it was not plaintiff's burden to introduce, in the pleadings, all of the facts relevant to this issue.

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[15]*See Branti*, 445 U.S. at 517 (affirming that although patronage dismissals are, in general, unconstitutional, "party affiliation may be an acceptable requirement for some types of government employment"); *Caudill*, 431 F.3d at 908 (discussing *Branti*'s clarification that, although patronage dismissals are generally unconstitutional, "party affiliation may be an acceptable requirement for some types of government employment."); *Jenkins v. Medford*, 119 F.3d 1156, 1161-65 (4th Cir. 1997) (explaining that *Branti* modified the test in *Elrod* by asking if "there is a rational connection between shared ideology and job performance").

Gomez v. Toledo, 446 U.S. 635, 640 (1980) ("Since qualified immunity is a defense, the burden of pleading it rests with the defendant."). The motion to dismiss was filed at the beginning of the case before Judge Frye filed his answer. The record had not yet been developed and, thus, the plaintiff was entitled to the reasonable inference that her position did not fall into the *Branti* exception.[16] Moreover, this defense would make more sense if Judge Frye had actually claimed that he thought he could fire Ms. Smith because she was a confidential employee but he conspicuously failed to do so when he was asked, under oath, about the reasons for his decisions.

2. The Fourth Circuit's Decision Sanctions Qualified Immunity Defenses in Cases Involving Clearly Unlawful Political Firings.

Prior to the Fourth Circuit's decision in this case, no public official would have thought to defend a political firing case on the grounds that the firing took place before the election or the that the public employee was fired by a political ally of the candidate rather than by the candidate himself. To the contrary, until now the rule was clear that political firings are prohibited unless the employee is a confidential or policy-making employee. *See* discussion in preceding section.

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[16]The panel majority has criticized the "paltry record on appeal" and the failure to include the filings of either party before the district court. App. 7a n.2]. However, the record was limited because Judge Frye moved to dismiss the case less than a month after the complaint was filed. Further, the appellate rules discourage parties from including legal memoranda filed before the district court in the appendix on appeal unless they have independent relevance and the parties agreed that the briefs on the motion to dismiss did not have independent legal relevance. F.R.A.P., Rule 30(a)(2).

The decision below, therefore, is likely both to increase the number of political firings and the claims of qualified immunity in political discharge cases. Under the court of appeals' analysis, a public official can successfully assert qualified immunity if he can distinguish the facts and circumstances of the political firing at hand from the specific facts and circumstances of *Elrod, Branti* and *Rutan*. Thus, instead of a reliable, common sense recognition that employment decisions cannot be based on a public employee's support or non-support for a given political candidate or political faction, each case will turn on the public official's ability to draw some distinction between the circumstances surrounding his politically-retaliatory conduct and the facts of the controlling cases previously decided.

Moreover, the absence of cases holding that pre-election firings are unconstitutional does not mean that public officials believe that political firings before election day are lawful. To the contrary, the absence of such cases suggests that public officials have recognized the legacy of *Elrod, Branti* and *Rutan*: political firings as well as other politically-motivated employment decisions are, with the exception of certain confidential and policy-making employees, no longer a part of our nation's political culture. The present case invites the use of qualified immunity to avoid liability for every politically-motivated employment action by decision-makers claiming that they could not have known that their particular acts were illegal because there were no prior controlling cases in which a firing occurred in the exact manner that it occurred in their case.

C. The Fourth Circuit Ignored The Standards Applicable to a Motion to Dismiss Under Rule 12(b)(6).

The principle grounds for reviewing the Fourth Circuit's decision is to address the appropriate scope of protection for public employees under the First and Fourteenth Amendments and the qualified immunity analysis applicable in political firing cases. However, the Fourth Circuit also erred in failing to accept as true the factual allegations in the complaint in considering the motion to dismiss. *Erickson v. Pardus*, __ U.S. __, 127 S. Ct. 2197, 2200 (2007) ("[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint."). Although the Fourth Circuit acknowledged this principle, it did not follow it in deciding this case. App. 5a (citing to *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992)).

For example, the panel majority speculated that perhaps Judge Frye had a legitimate reason for terminating Ms. Smith's employment in that his belief that Ms. Smith supported her son's candidacy "might have lead Judge Frye to conclude that, in a small office in which Ms. Smith was working with the incumbent circuit clerk, the potential conflict of interest would hinder the efficient administration of the judicial system." App. 14a. It based this speculation upon its assertion that "[i]t is undisputed that Judge Frye's colleague testified in the state administrative proceedings that Judge Frye expressed those very concerns to him. In the context of at-will employment, such a belief is more than an adequate reason to dismiss an employee." App. 14a.[17]

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[17]However, the record included only the administrative decision and not the transcript of the personnel hearing. The Fourth

There are several problems with the Fourth Circuit's conjecture about Judge Frye's motives. First, conjecture as to what "might have led Judge Frye to conclude that" there was a potential conflict of interest has no place in a decision on a motion to dismiss where the issue is whether the plaintiff has stated a cause of action for a political firing, not what the defendant might or might not later prove in his defense.[18]

Second, it was inappropriate for the panel majority to posit a lawful motive for Judge Frye's firing decision at this stage of the proceedings when Judge Frye declined to offer that motive himself when given the opportunity, under oath, in a personnel hearing. At that hearing, Judge Frye refused to provide a reason for his action, insisting instead that he did not have *any* reason or motive for firing Ms. Smith. App. 50a (Compl. ¶ 26). In fact, Judge F ye went further and specifically denied that Greg Smith's candidacy had anything to do with his decision, claiming, albeit untruthfully, that he had planned to fire Ms. Smith before he learned that her son was running for public office. App. 50a-51a (Compl. ¶¶ 27-28).

Third, Judge Frye did not argue that this was the reason he fired Ms. Smith in his motion to dismiss or in any of the other briefs he presented to the District Court or Fourth Circuit. It would have been improper for the court of appeals to credit Judge Frye's *actual* testimony when it conflicted with the allegations in the complaint. It was at least equally improper for

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Circuit apparently adopted this erroneous "fact" from the administrative hearing examiner's decision in which the hearing officer took a piece of Judge Jordan's testimony about his conversations with Judge Frye out of context.

[18]Assertions, such as those attributed to Judge Frye by the panel majority, may also be pretextual.

the court of appeals to proffer an affirmative defense for Judge Frye that he has not put forward himself.

Judge Motz recognized the Court's error, criticizing the panel majority's failure to follow the correct standard applicable to a Rule 12(b)(6) motion, noting that "[a]lthough the majority insists that it reads Ms. Smith's complaint 'liberally,' *ante* at 6 n.2, it clearly fails to do so." App. 22a, n.*. Judge Motz then cataloged the ways in which the panel majority failed to treat Ms. Smith's allegations as true in reaching its decision:

> Thus the majority contends that the complaint fails because it does not allege "what Ms. Smith's views or affiliation are or were." In fact, as noted above, the complaint alleges that Judge Frye discharged Ms. Smith "because [he] believed that [she] supported her son, not the incumbent circuit clerk." Read in the light most favorable to Ms. Smith, that allegation asserts both a "view" (that her son should be elected) and an "affiliation" (with her son's candidacy). The majority also faults the complaint for its failure to allege that "Judge Frye was aware of [Ms. Smith's] beliefs or affiliation." But surely Ms. Smith's allegation that Judge Frye fired her *because* of what he "believed" her views and affiliation to be suffices. Judge Frye may have been wrong about Ms. Smith's beliefs or affiliation; but if he fired her for an unconstitutional reason she would still have a cause of action. "[A]lleged discrimination is no less malevolent because it was based on an erroneous assumption." And even if Ms. Smith had to demonstrate that she actually did support her son, surely that fact "could be prove[n] consistent with the allegations" in the complaint.

App. 22a, n* (internal citations omitted).

The panel majority's failure to accept as true all of the factual allegations contained in the complaint in determining whether Ms. Smith had stated a cause of action sufficient to survive a motion to dismiss, further justifies granting Ms. Smith's petition for review.

CONCLUSION

For the reasons stated above, the petition should be granted.

Respectfully submitted,

ALLAN N. KARLIN
Counsel of record
Allan N. Karlin & Associates

September 13, 2007

APPENDIX A

No. 06-1801

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MARY LOU SMITH; GREG SMITH, Plaintiffs-Appellants, v. HONORABLE ANDREW N. FRYE, JR., Defendant-Appellee.

488 F.3d 263*; *2007 U.S. App. LEXIS 11632*; *154 Lab. Cas. (CCH) P60,411*; *26 I.E.R. Cas. (BNA) 106

March 12, 2007, Argued
May 18, 2007, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. David A. Faber, Chief District Judge. (2:06-cv-00014-DAF).
Smith v. Frye, 2006 U.S. Dist. LEXIS 39909 (N.D. W. Va., June 14, 2006)

DISPOSITION: AFFIRMED.

COUNSEL: ARGUED: Allan Norman Karlin, Morgantown, West Virginia, for Appellants.

John M. Hedges, BYRNE, HEDGES & LYONS, Morgantown, West Virginia, for Appellee.

ON BRIEF: Teresa J. Lyons, BYRNE, HEDGES & LYONS, Morgantown, West Virginia, for Appellee.

JUDGES: Before NIEMEYER, MOTZ, and DUNCAN, Circuit Judges. Judge Duncan wrote the opinion, in which Judge Niemeyer concurred. Judge Motz wrote a separate opinion concurring in part and concurring in the judgment.

OPINION BY: DUNCAN

OPINION

DUNCAN, Circuit Judge:

Appellants Mary Lou Smith ("Ms. Smith") and her son, Greg Smith ("Mr. Smith"), appeal the district court's dismissal of their suit against Judge Andrew N. Frye, Jr. ("Judge Frye"), Chief Circuit Judge for the Twenty-First Judicial Circuit in West Virginia. Judge Frye discharged Ms. Smith from her at-will employment as a magistrate court clerk after Mr. Smith filed as a candidate for the position of circuit clerk against the incumbent, Ms. Smith's colleague. Appellants brought this action under *42 U.S.C. § 1983*, alleging a violation of their *First Amendment* rights.

Judge Frye moved to dismiss the complaint based upon failure to state a claim and the defense of qualified immunity. Judge Frye further contended that Mr. Smith lacked standing. The district court dismissed the complaint, concluding that Ms. Smith had failed to state a claim because she did not exercise any *First Amendment* rights prior to her discharge and that Mr. Smith's claims failed for want of standing.

We hold that Ms. Smith has failed to state a claim that her firing violated her *First Amendment* speech or associational rights and also hold that Mr. Smith lacks standing. We therefore affirm.

I.

Ms. Smith was hired as the Clerk of the Magistrate Court of Mineral County, West Virginia in November 2002. The Clerk of the Magistrate Court serves at the will and pleasure of the Chief Judge of the Twenty-First Judicial Circuit of West Virginia. Two circuit judges for the Twenty-First Judicial Circuit, Judge Philip B. Jordan, Jr. and Judge Andrew N. Frye, Jr., take turns serving as Chief Judge based on a regular two-year rotation. When Ms. Smith was first hired, Judge Jordan was serving as Chief Judge. On January 1, 2003, Judge Frye assumed the role. From the time of her hiring, Ms. Smith apparently performed her job adequately, receiving no complaints about her performance.

On January 30, 2004, Ms. Smith's adult son, Mr. Smith, filed to run for the office of Mineral County Circuit Clerk. At that time, the office was held by an incumbent Republican whom Mr. Smith would challenge in the Republican primary. Several days later, Judge Frye told Judge Jordan that he intended to fire Ms. Smith because of her son's candidacy. Judge Frye expressed concerns over potential conflicts of interest and the proper functioning of the local judicial system created by the combination of Ms. Smith's employment and her son's candidacy. Judge Frye terminated Ms. Smith's employment on February 5, 2004.

The personnel policies and procedures governing the West Virginia judicial system, as promulgated by the West Virginia Supreme Court of Appeals, grant an employee dismissed without cause a postdismissal hearing to determine if the dismissal was actually due to reasons impermissible under federal or state law. *See* Sections 6.2(E),(G) of the West Virginia Judicial Personnel System Manual (effective Jan. 1990, and as subsequently amended), at J.A. 32-33. In such cases, the Administrative Director of the Supreme Court of

Appeals or his designee appoints a hearing examiner, who in turn takes evidence, makes findings, and submits such findings and recommendations back to the Administrative Director. The Administrative Director must then affirm or reverse the hearing examiner's report. If the Administrative Director finds against the employee, the employee may request an administrative review by the Supreme Court of Appeals, which may grant or deny the request, or uphold or reject the dismissal. Any decision by the Supreme Court of Appeals is final.

In this case, Ms. Smith exhausted the administrative review available to her. The hearing examiner found that Ms. Smith "would not have been discharged had her son not become a candidate for circuit clerk, but that her discharge did not violate state or federal law." *Smith v. Frye, No. 2:06-CV-14, 2006 U.S. Dist. LEXIS 39909, at *4 (N.D. W. Va. June 14, 2006).* The designee of the Administrative Director affirmed the examiner's report, and the Supreme Court of Appeals denied Ms. Smith administrative review.

After exhausting Ms. Smith's administrative review, both she and Mr. Smith filed suit in federal court alleging that Judge Frye violated their *First Amendment* rights. The Smiths allege that Judge Frye fired Ms. Smith because he believed that Ms. Smith supported her son's candidacy, and not that of the incumbent circuit clerk. Although the Smiths' allegations have been both vague and evolving, they do *not* allege that Ms. Smith demonstrated her support through expressive activity or through association. Judge Frye brought a *Federal Rule of Civil Procedure 12(b)(6)* motion to dismiss Ms. Smith's claim, and a motion to dismiss Mr. Smith's claim for lack of standing. The district court granted both motions, and we now review the Smiths' appeals from the district court's decisions on each in turn.

II.

We first address Ms. Smith's claims that the district court erred in dismissing her claims under *Rule 12(b)(6)*. We review de novo a district court's dismissal under *Rule 12(b)(6)*, *Mylan Labs, Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993)*, and accept all allegations in Ms. Smith's complaint as true, *Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992)*. Therefore, we assume that Judge Frye fired Ms. Smith because he believed she supported Mr. Smith's candidacy in the race for circuit clerk.

A.

Ms. Smith argues that the district court erred in relying upon cases involving allegedly retaliatory actions taken against public employees based on the content of their speech rather than on cases addressing public employees' associational rights. Indeed, the district court concluded that because Ms. Smith does not allege she said or did anything in support of her son's candidacy (i.e., she does not allege she exercised *First Amendment* rights) that her claim failed as a matter of law. In reaching this result, the district court applied the so-called *McVey* test, our circuit's three-prong test to determine if a retaliatory employment action violates an employee's *First Amendment* rights. *See Ridpath v. Bd. of Governors of Marshall Univ., 447 F.3d 292, 316 (4th Cir. 2006)*; *McVey v. Stacy, 157 F.3d 271, 277-78 (4th Cir. 1998)*.

> First, the public employee must have spoken as a citizen, not as an employee, on a matter of public concern. Second, the employee's interest in the expression at issue must have outweighed the employer's interest in providing effective and efficient services to the public. Third, there must have been a sufficient causal nexus between the

> protected speech and the retaliatory employment action.

Ridpath, 447 F.3d at 316 (internal citations and quotations omitted). Because the first prong of the *McVey* test requires that the "public employee . . . have spoken out as a citizen . . . on a matter of public concern," *id.*, the district court found Ms. Smith's claim failed because she had not spoken or expressed herself in any way. We find no error in the district court's analysis on this issue,[1] but we agree with Ms. Smith that we must also review the claim that her firing violated her *First Amendment* associational rights. We consider that claim below.

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[1] Furthermore, Ms. Smith cannot make a *McVey* claim based on perceived or expected speech. That is, she cannot rest a *First Amendment* retaliation claim on speech Judge Frye perceived she would engage in if not terminated. The second prong of the *McVey* test requires that "the employee's interest in the expression at issue . . . outweigh[] the employer's interest in providing effective and efficient services to the public," *Ridpath, 447 F.3d at 316* (internal quotations omitted). In two recent opinions dealing with the free speech of public employees, the Supreme Court has underscored the government's interest in this balancing test. *See Garcetti v. Ceballos, 126 S. Ct. 1951, 1958, 1960-62, 164 L. Ed. 2d 689 (2006)* ("A government entity has broader discretion to restrict speech when it acts in its role as employer . . . ."); *Waters v. Churchill, 511 U.S. 661, 671-74, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994)*. Given the government-as-employer's interests in regulating workplace behavior, including speech in some instances, recognizing a cause of action for employees based on speech not yet spoken would seem an ill-advised disturbance to the balance established in the *McVey* test, especially in an at-will setting.

B.

Ms. Smith argues that her termination violated the *First Amendment* even in the absence of the exercise of *First Amendment* speech rights, relying upon the Supreme Court's decisions in *Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)*, and *Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980)*, and their progeny. She asserts that Judge Frye's dismissing her from her at-will post as magistrate clerk because he believed she supported her son's campaign offends *Elrod*'s prohibition on politically-motivated firings.[2]

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[2] In response to our colleague's concurring opinion, we emphasize again that we accept Ms. Smith's allegations as true. We read them liberally, as well, as indeed we must to analyze them at all; Ms. Smith's arguments have mutated to such an extent on appeal that the current iteration--focusing, it appears, on freedom of association rather than expression--was not addressed by the district court. Other than the Smiths' complaint, none of the filings of either party before the district court are included in the paltry record on appeal. Therefore, it is unclear whether Ms. Smith even raised what now appear to be her associational claims below.

Even interpreted liberally, however, Ms. Smith must show, as a threshold matter, that the act she complains of deprives her of a right, privilege, or immunity secured by the Constitution or laws of the United States. *See 42 U.S.C. § 1983*; *Marshall County Bd. of Ed. v. Marshall County Gas Dist., 992 F.2d 1171, 1174 (11th Cir. 1993)*. The issue before us is whether, in claiming she was fired because Judge Frye *believed* she supported her son's candidacy, Ms. Smith alleged a violation of her rights under the *First Amendment*. For the reasons discussed in the body of this opinion, we conclude that she does not. Significantly, Ms. Smith does not allege that action was taken against her because of her conduct, speech or political affiliation. Indeed, she alleges no conduct or speech. Ms. Smith's complaint and the record in this case contain no allegations of what

The *Elrod-Branti* line of cases establishes that a public employee may not, consistent with the *First* and *Fourteenth Amendments*, be terminated for her political affiliation or lack thereof. *Elrod, 427 U.S. at 358-59* (plurality opinion); *Knight v. Vernon, 214 F.3d 544, 548 (4th Cir. 2000)*. "[T]he *First Amendment* forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved." *Rutan v. Republican Party of Ill., 497 U.S. 62, 64-65, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990)*. These cases concern the political practice of patronage, or conditioning public employment on party membership or support.

Patronage violates the *First Amendment* because of the "restraint it places on freedoms of belief and association." *Elrod, 427 U.S. at 355* (plurality opinion). Because patronage forces employees to choose either to affiliate with a particular

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Ms. Smith's views or affiliation are or were. Nor does she allege Judge Frye was aware of her beliefs or affiliation when he fired her. We are simply unable to find a constitutional basis for such an attenuated claim, nor can we read any of the *Elrod* line of cases as creating one.

As the concurrence would have it, *post* at 18 n.*, Ms. Smith's complaint asserts both a "view" (that her son should be elected) and an "affiliation" (with her son's candidacy). On its face, it does *not*. In Ms. Smith's own words, which we accept as true, Judge Frye dismissed her not because of what her views or affiliation *were* but because of, again using Ms. Smith's own word, what he "believed" they might have been. While the concurrence may not view such a claim as attenuated, we do; even the concurrence goes on to acknowledge that Ms. Smith's allegations lie outside the heartland of *Elrod*.

party or risk losing their jobs, it compels speech and belief. *Id. at 356-57.* However, patronage dismissals of individuals in policymaking positions are constitutional, "to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate." *Id. at 367.* Ms. Smith argues, in effect, that Judge Frye engaged in improper patronage by firing her because her son filed to run for office and because Judge Frye perceived that she supported her son's candidacy.[3]

The facts here, however, present a significant departure from the traditional *Elrod* scenario. In this circuit, *Elrod* cases have fallen into two primary archetypes: (1) cases in which the person being fired is actively associated with a political party or faction (or actively chooses *not* to be so associated) and the individual making the firing decision is a person seeking office, *e.g., Knight v. Vernon, 214 F.3d 544, 545-48 (4th Cir. 2000)*; or (2) cases in which newly elected or appointed officials fire supporters of their rivals during a political transition, *e.g., Sales v. Grant, 158 F.3d 768, 770-74 (4th Cir. 1998)*; *Jenkins v. Medford, 119 F.3d 1156, 1159 (4th Cir. 1997)*; *Cooper v. Lee County Bd. of Supervisors, No. 98-2083, 1999 U.S. App. LEXIS 19705, at *2-9 (4th Cir. Aug. 19, 1999)* (unpublished). Indeed, both *Elrod* and *Branti* presented factual scenarios fitting within

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[3] Neither party offers this court guidance on whether the position of magistrate court clerk, Ms. Smith's former post, is the type of position to which *Elrod*'s protections extend. The record in this case is also devoid of facts that would demonstrate whether Ms. Smith's position is a policymaking position, for which dismissals for reasons of patronage are constitutionally permissible. *See also Branti, 445 U.S. at 518* ("[T]he question is whether . . . party affiliation is an appropriate requirement for the effective performance of the public office involved.")

the latter category. *See Elrod, 427 U.S. at 350-51*; *Branti, 445 U.S. at 509-10*.

A brief review of the facts of some of the cases in the *Elrod* line is useful in analyzing the facts now before us. We first consider a case representing the initial archetypal fact pattern described above. The plaintiff in *Knight v. Vernon*, a former jailer, sued the sheriff who fired her, claiming her termination was an act of patronage in violation of the *First Amendment*. *214 F.3d at 545*. In *Knight*, the firing sheriff was running for reelection and used staff meetings to promote his reelection campaign, urging employees to contribute money, display his signs in their yards, and attend campaign events. *Id. at 547*. The plaintiff did not participate in the sheriff's reelection efforts. When she expressed concern about her job security, the sheriff instructed her to "throw [herself] completely into his campaign." *Id. at 547-48*. After winning the election, the sheriff fired the plaintiff. *Id. at 548*. We reversed the district court's grant of summary judgment in favor of the government employer on the plaintiff's *First Amendment* claim, finding that political allegiance was not an appropriate job requirement for a jailer and that the plaintiff therefore had stated a claim under *Elrod*. *Id. at 545*.

In the sense that the *Knight* plaintiff's firing came *after* the sheriff's successful campaign, *Knight* is also similar to the cases whose facts fit squarely into the second paradigm:[4] those involving the housecleaning that can occur during a political

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[4] Indeed, the lines between the two types of *Elrod* cases are not always bright and distinct. However, in the first type, the official's act seems to be a *punishment* of the fired employee for her affiliation or nonaffiliation, whereas in the second type of case, the punishment of the fired employee is incidental to the firing official's real motivation to *reward* loyal supporters for their affiliation with him.

transition. In *Jenkins v. Medford*, we considered, en banc, the firings of two deputies by a North Carolina sheriff because the deputies failed to support the sheriff in an election. *119 F.3d at 1159*. There, the fired deputies had supported the losing candidate, and when the winner was seated, he replaced them with deputies loyal to him and his campaign. *Id.* Ultimately, we determined that "in North Carolina, the office of deputy sheriff is that of a policymaker" and concluded therefore that North Carolina deputy sheriffs may be lawfully terminated for political reasons as an exception to *Elrod-Branti*. *Id. at 1164*.

One year after deciding *Jenkins*, we again reviewed a case involving postelection termination for political affiliation in *Sales v. Grant*. The plaintiffs in *Sales* were Democrats who had been appointed assistant registrars of Lynchburg, Va. They sued a local appointing body after it caused them not to be reappointed following the election of a new, Republican governor. *158 F.3d at 774*. We held that the plaintiffs were entitled to a trial on their claims. *Id. at 770*.

An assessment of decisions of our sister circuits interpreting *Elrod* reveals the same fact patterns described above. *See, e.g., Allen v. Martin, 460 F.3d 939, 940 (7th Cir. 2006)* (affirming summary judgment in favor of government officials when the plaintiff was terminated during a regime change from a position for which political affiliation was an appropriate criterion); *Borges Colon v. Roman-Abreu, 438 F.3d 1, 6 (1st Cir. 2006)* (affirming award of damages to city sanitation employees dismissed by a newly elected mayor because they shared the political affiliation of the ousted mayor); *Gentry v. Lowndes County, 337 F.3d 481, 483-85 (5th Cir. 2003)* (granting qualified immunity to newly elected county officials who terminated plaintiffs' jobs as road manager and county administrator); *Aucoin v. Haney, 306 F.3d 268, 270-71 (5th Cir. 2002)* (granting qualified immunity to an interim district attorney running for office who fired an assistant district

attorney who openly supported opponent). Although these cases vary in their decisions on the merits, the facts fall consistently into one of the two patterns we have described.

By contrast, recognizing Ms. Smith's claim would lead us far afield.[5] In each of the above-cited cases, even those in which the plaintiff's claim ultimately failed, there is a clear and direct connection among the supervisor's own political association, that of the terminated employee, and the adverse employment action.

The Supreme Court has held that "the test of 'clearly established law'" is not to be applied at a level of broad "generality" but rather, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Anderson v. Creighton, 483 U.S. 635, 639-40, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).* "[I]n the light of preexisting law the unlawfulness [of the official's actions] must be apparent." *Id. at 640.* Ms. Smith admits that she cannot "identif[y] a case under *42 U.S.C. § 1983* directly on point," Appellants' Br. at 14, and neither can we. Given this, and our discussion of the cases applying *Elrod*, any unlawfulness of Judge Frye's actions here in firing Ms. Smith could only have been "[un]apparent," *Anderson, 483 U.S. at 640*, and therefore not likely to be "known [by] . . . a reasonable person," *Harlow, 457 U.S. at 818.*

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[5] For this reason we are satisfied that, even if we were to find that Ms. Smith had alleged the violation of a constitutional right, Judge Frye would nonetheless be entitled to qualified immunity in this case. Under the doctrine of qualified immunity, government officials are generally immune "from liability for civil damages insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); see also Johnson v. Caudill, 475 F.3d 645, 650 (4th Cir. 2007).*

There is no such connection here. Smith alleges no affiliation with her son's candidacy, unlike the fired deputies in *Jenkins* who supported the losing candidate in the sheriff's race. *See 119 F.3d at 1159*. In fact, she alleges no affiliation with any political party or faction, making her unlike even the assistant registrars in *Sales* who were not reappointed based on their party affiliation with opponents of the newly empowered party. *See 158 F.3d at 774*. Judge Frye was not himself seeking office and terminating those who did not support his candidacy, as was allegedly done by the supervising sheriff in *Knight*. *See 214 F.3d at 545*. Nor was Judge Frye cleaning house after an electoral victory, as in the fact patterns of *Elrod*, *Branti*, *Jenkins*, and *Sales*. *See Elrod, 427 U.S. at 350-51*; *Branti, 445 U.S. at 509-10*; *Jenkins, 119 F.3d at 1159*; *Sales, 158 F.3d at 774*. Finally, unlike *all* of the cited Fourth Circuit cases, Ms. Smith was terminated at the time the field for the Republican primary was set and included her son and the incumbent circuit clerk and not after an election as in the typical *Elrod* scenario. The application of *Elrod*'s rationale--protecting public employees for whom political affiliation is not a legitimate job qualification from coercion with respect to their political beliefs--is far less compelling on these facts. Given the decisionmaker's detachment from the political process at play, any conclusion that Judge Frye's decision was intended to punish Ms. Smith for expressive conduct or political affiliation or to compel her conduct or affiliation requires an additional inferential leap which we are unwilling to make.

Indeed, the very differences between the circumstances here and those in the cases within the usual *Elrod* fact patterns suggest that Judge Frye had constitutionally valid reasons for dismissing Ms. Smith. Although we of course accept as true at this stage of the litigation Ms. Smith's allegation that she was fired because Judge Frye believed that she supported her son's candidacy rather than that of the incumbent circuit clerk, such

an allegation does not necessarily, by itself, state a *First Amendment* claim under *Elrod*. Rather, Judge Frye's belief that Ms. Smith supported her son's candidacy might have lead Judge Frye to conclude that, in a small office in which Ms. Smith was working with the incumbent circuit clerk, the potential conflict of interest would hinder the efficient administration of the judicial system. It is undisputed that Judge Frye's colleague testified in the state administrative proceedings that Judge Frye expressed those very concerns to him. In the context of at-will employment, such a belief is more than an adequate reason to dismiss an employee.

Extending *Elrod* to Ms. Smith's claim would require courts to undertake subjective factfinding inquiries into government officials' actual motivations in making at-will employment decisions to a greater extent than and in contexts in which this court has never ventured. Such an exercise, on these attenuated facts, would topple the *Elrod-Branti* balance of "*[F]irst [A]mendment* rights of the [public employees] and the need for efficient and effective delivery of public services." *Terry v. Cook, 866 F.2d 373, 377 (11th Cir. 1989)*. As the Supreme Court has cautioned, "if an employee's private political beliefs would interfere with the discharge of his public duties, his *First Amendment* rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." *Branti, 445 U.S. at 517.*

We are disinclined to disturb that balance on these facts. Judge Frye dismissed Ms. Smith from her at-will employment as magistrate court clerk, a position to which it is unclear *Elrod*'s protections apply,[6] neither in the heat of his own

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[6] The uncertainty regarding whether Ms. Smith's position was of the type entitled to *Elrod*'s protections provides another reason that, even if Ms. Smith could state a claim under *Elrod*, Judge Frye would be entitled to qualified immunity. It is not "clearly

campaign nor during a victory housecleaning. We do not find that Ms. Smith alleges a constitutional violation here, and therefore affirm the district court's dismissal of her claims.

III.

We now turn to Mr. Smith's argument that the district court improperly dismissed the complaint as to him for lack of standing. "A district court's dismissal for lack of standing, and therefore lack of jurisdiction, is a legal ruling that we review de novo." *White Tail Park, Inc. v. Stroube, 413 F.3d 451, 459 (4th Cir. 2005).*

It is well settled that under Article III of the United States Constitution, a plaintiff must establish that a "case or controversy" exists "between himself and the defendant" and "cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).* Standing has three elements:

> First, the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to

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established" that Ms. Smith's position is a protected one, rather than one for which political affiliation is a legitimate job requirement. *See Jenkins, 119 F.3d at 1162 n.37.*

> merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citations and quotations omitted).

The threshold issue in this case is whether Mr. Smith suffered an injury in fact for purposes of Article III standing. Mr. Smith alleges such an injury on two grounds. First, he argues that his *First Amendment* rights as a candidate for public office were chilled by Judge Frye's allegedly retaliatory firing of Mr. Smith's mother. Additionally, Mr. Smith avers that he suffered the injuries of indignity, embarrassment, and emotional distress because he felt responsible for his mother's discharge. Judge Frye responds that any legally cognizable injury flowing from Ms. Smith's dismissal is an injury to *her* for which Mr. Smith lacks standing. We address each of Mr. Smith's arguments in turn and conclude that he does not have standing to assert the instant claims.

A.

In support of his position that his *First Amendment* rights were chilled by Judge Frye's discharge of his mother, Mr. Smith relies upon our decision in *Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474 (4th Cir. 2005)*, in which a law student published letters in the school's newspaper criticizing a professor and his grading process after she had been unable to complete an exam because of a migraine headache. After publishing the letters, the student received a failing grade. Later, the student was permitted to retake the exam but was only provided three days' notice. We held that to demonstrate injury in fact, it was sufficient for the plaintiff in that case to show that her *First Amendment* activities had been chilled and that she need not show she ceased those activities altogether in order to state a cause of action. *Id. at 500.* A chill

results "if the defendant's allegedly retaliatory conduct would likely deter 'a person of ordinary firmness' from the exercise of *First Amendment* rights." *Id.* Accordingly, Mr. Smith argues that even though his candidacy went on unaffected after his mother's firing, "a person of ordinary firmness" would have been deterred from exercising his *First Amendment* rights.

However, *Constantine* is fundamentally distinguishable from this case. In *Constantine*, the plaintiff's *First Amendment* rights were chilled by direct retaliatory action against her, whereas in the instant case, the alleged retaliatory action was taken not against Mr. Smith at all, but rather against a third party, his mother. Mr. Smith cites to no authority that supports his contention that further speech of a person who exercised *First Amendment* rights (here, Mr. Smith in filing his candidacy) might be chilled by an allegedly retaliatory action (here, the firing of Ms. Smith) exacted upon a different person.[7] Quite simply, under the circumstances of this case, an adverse employment action against Ms. Smith does not create a

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[7] In fact, at least one Supreme Court decision casts doubt on whether such an indirect chill could ever give rise to a cause of action. *See Laird v. Tatum, 408 U.S. 1, 10-11, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972).* In *Laird*, the Court held that when the government engages in "regulatory, proscriptive, or compulsory" action, a plaintiff's speech rights are chilled only if he is "either presently or prospectively subject" to the challenged exercise of government power. *Id.* (citations omitted). Here, Mr. Smith is a bystander to an allegedly unlawful government action (his mother's firing), but he himself is not "presently or prospectively subject" to the challenged action. *See id. Cf. Younger v. Harris, 401 U.S. 37, 41-42, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)* (holding that plaintiffs who had not been indicted in a state proceeding had no "controversy" with the state where they alleged simply that a law's existence, and the state prosecution of a third party under such law, made them feel inhibited in their political advocacy activities).

concrete and particularized violation of any legally protected right of Mr. Smith's. *See Lujan, 504 U.S. at 560.*[8]

B.

With respect to Mr. Smith's argument that he suffered injury in the form of emotional distress after Judge Frye terminated his mother, the district court applied the venerable common-law tort principle that "one cannot collect for emotional damage or humiliation occasioned by harm done to a family member absent fairly particular circumstances,"[9] and noted that claims under *§ 1983*, like Mr. Smith's, are "at [their] root[s,] . . . tort[s]." *Smith v. Frye, 2006 U.S. Dist. LEXIS 39909, at *12.* Mr. Smith now contends that the district court's reliance on tort principles was misplaced.

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[8] No matter how disappointing his mother's termination was for him, Mr. Smith's candidacy for public office cannot immunize his mother from the downside of at-will employment. That is, Ms. Smith's firing for legally permissible reasons, or for no reasons at all, gives rise to no claim that *Mr. Smith's First Amendment* rights were being chilled. Any claim that Ms. Smith was fired for unlawful reasons can be brought by her, the directly injured party, as evidenced by this lawsuit. *See Singleton v. Wulff, 428 U.S. 106, 113-14, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976)* (noting that the directly-injured parties "themselves usually will be the best proponents of their own rights"); *Warth, 422 U.S. at 499.*

[9] For example, under West Virginia law, a third-party plaintiff may recover for intentional infliction of emotional distress if a defendant's "extreme and outrageous" conduct, directed at a member of the plaintiff's immediate family while he was physically present, caused the plaintiff "severe emotional distress." *See, e.g., Courtney v. Courtney, 186 W. Va. 597, 413 S.E.2d 418, 422 (W. Va. 1991).* Obviously, Mr. Smith could not prove these elements on a state-law tort claim.

We, however, find the district court's reference to tort-law principles entirely appropriate in this instance. *See Smith v. Wade, 461 U.S. 30, 34, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983)* (noting that *§ 1983* "was intended to create a species of tort liability" and that the Supreme Court "look[s] . . . to the common law of torts . . . to carry out the purpose and policy of the statute" (internal quotations omitted)). We agree with the district court that "[a]llowing an adult son to collect for emotional damages and humiliation resulting from his mother's discharge from her employment casts the net of possible liability too broadly," *Smith v. Frye, 2006 U.S. Dist. LEXIS 39909, at *14*, and therefore, that such emotional distress is insufficient as an Article III injury in fact. Because we reject as insufficient both of the injuries Mr. Smith alleges, we affirm the district court's ruling that he lacked standing to bring the instant suit and its dismissal thereof as to Mr. Smith.

IV.

Having concluded that Ms. Smith has failed to state a claim that Judge Frye violated her *First Amendment* rights and that Mr. Smith lacks standing to assert claims against Judge Frye based on his mother's termination, we affirm the district court's dismissal of the Smiths' complaint.

AFFIRMED

CONCUR BY: DIANA GRIBBON MOTZ

CONCUR

DIANA GRIBBON MOTZ, Circuit Judge, concurring in part and concurring in the judgment:

I join the majority opinion except for its determination that Mary Lou Smith has failed to allege a cause of action for violation of her *First Amendment* rights. I believe that in her

complaint Ms. Smith has indeed alleged facts sufficient to state a claim against Andrew N. Frye. But because applicability of the *First Amendment* to facts like those alleged was not clearly established at the time of the challenged discharge, qualified immunity protects Judge Frye from liability. Accordingly, I concur in the judgment.

I.

A.

"[T]he purpose of a *Rule 12(b)(6)* motion is to test the sufficiency of a complaint." *Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999)*. A 12(b)(6) motion "'does not resolve contests surrounding the facts [or] the merits of a claim.'" *Id.* (*quoting Republican Party v. Martin, 980 F.2d 943, 952 (4th Cir. 1992)*). Accordingly, an appellate court "may only affirm the dismissal of the complaint if 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 249-50, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)* (*quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*). Moreover, when a complaint alleges a civil rights violation, "we must be especially solicitous of the wrongs alleged and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief *under any legal theory*" that could be proved consistent with the allegations. *Edwards, 178 F.3d at 244* (overturning dismissal of suspended government employee's *First Amendment* claims). With these principles in mind, I turn to the allegations of Ms. Smith's complaint, which we must take as true at this juncture.

Beginning in November 2002, Ms. Smith served as the clerk of the Magistrate Court of Mineral County, West Virginia, under the supervision of Judge Frye, Chief Judge of the 21st Judicial Circuit of West Virginia. Ms. Smith has an adult son,

Greg Smith. On January 30, 2004, Greg filed to run for circuit clerk of Mineral County; he would oppose the incumbent clerk in the Republican primary. Less than a week later, Judge Frye fired Ms. Smith. Judge Frye told another judge that "he wanted to fire Ms. Smith because her son had filed to run for circuit clerk" and he was "angry at" her for this reason. Prior to this time "no complaints had been made by anyone about Ms. Smith's performance as the Magistrate Clerk; to the contrary she was widely respected by everyone with whom she worked." Ms. Smith's complaint alleges that Judge Frye discharged her "because her son, Greg Smith, had filed to run against the incumbent Circuit Clerk in the Republican Party primary and *because the defendant believed that Ms. Smith supported her son, not the incumbent circuit clerk.*" (emphasis added).

The question is whether these allegations, viewed in the light most favorable to Ms. Smith, state a *First Amendment* claim. I believe they do.

B.

"[P]olitical belief and association constitute the core of those activities protected by the *First Amendment.*" *Elrod v. Burns, 427 U.S. 347, 356, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)* (plurality). For that reason, the Supreme Court has held that "the *First Amendment* prohibits the dismissal of a public employee solely because of [her] private political beliefs." *Branti v. Finkel, 445 U.S. 507, 516-17, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980).* The *First Amendment* also "prohibits the firing of public employees solely for the reason that they [are] not affiliated with a particular political party *or* candidate." *Knight v. Vernon, 214 F.3d 544, 548 (4th Cir. 2000)* (emphasis added) (internal quotation marks omitted). The only exception to the *Elrod-Branti* bar on politically motivated personnel decisions occurs when an employer "can demonstrate that party affiliation [or political allegiance] is an appropriate requirement

for the effective performance of the public office involved." *Branti, 445 U.S. at 518*. Thus a public employer may discharge an employee because of her political beliefs or allegiance only if the employer "can demonstrate" that this is an "appropriate requirement" for the employee's "public office." *Knight, 214 F.3d at 549* (citing *Branti, 445 U.S. at 518*) (internal quotation marks omitted).

In this case, Ms. Smith has alleged that Judge Frye fired her "because [he] believed that [she] supported her son, not the incumbent circuit clerk" in the upcoming Republican primary.*

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* Although the majority insists that it reads Ms. Smith's complaint "liberally," *ante* at 6 n.2, it clearly fails to do so. Thus the majority contends that the complaint fails because it does not allege "what Ms. Smith's views or affiliation are or were." *Id.* In fact, as noted above, the complaint alleges that Judge Frye discharged Ms. Smith "because [he] believed that [she] supported her son, not the incumbent circuit clerk." Read in the light most favorable to Ms. Smith, that allegation asserts both a "view" (that her son should be elected) and an "affiliation" (with her son's candidacy). The majority also faults the complaint for its failure to allege that "Judge Frye was aware of [Ms. Smith's] beliefs or affiliation." *Id.* But surely Ms. Smith's allegation that Judge Frye fired her *because* of what he "believed" her views and affiliation to be suffices. Judge Frye may have been wrong about Ms. Smith's beliefs or affiliation; but if he fired her for an unconstitutional reason she would still have a cause of action. "[A]lleged discrimination is no less malevolent because it was based on an erroneous assumption." *Estate of Amos ex rel. Amos v. City of Page, 257 F.3d 1086, 1094 (9th Cir. 2001)* (allowing claim that city discriminated against deceased because it believed he was Native American, even though he was actually white). And even if Ms. Smith had to demonstrate that she actually did support her son, surely that fact "could be prove[n] consistent with the allegations" in the complaint. *Hishon, 467 U.S. at 73*. When read in the best light for Ms. Smith, her complaint alleges that Judge Frye used the power of the state to punish Ms. Smith for her political

Certainly, Ms. Smith could prove a "set of facts . . . consistent with [this] allegation[]" that would entitle her to relief for a violation of her *First Amendment* rights. *Hishon, 467 U.S. at 73.* For example, Ms. Smith could prove that Judge Frye dismissed her "because of [her] private political beliefs," i.e., her support for a particular political candidate -- her son. *See Branti, 445 U.S. at 517.* Or, she could prove that Judge Frye discharged her solely because she was not "affiliated with" a particular candidate, i.e., her son's opponent--the incumbent circuit clerk. *See id.* In these situations, each consistent with the complaint, Judge Frye's dismissal of Ms. Smith would be "substantially motivated by political considerations," *Sales v. Grant, 158 F.3d 768, 779 (4th Cir. 1998)*, not justified by any "appropriate" job requirement, and so contrary to the *First Amendment.*

Of course, discovery might produce evidence that Judge Frye discharged Ms. Smith, as the majority posits, *ante* at 3, 10-11, to avoid disruption to the judicial system. Although Ms. Smith's complaint states that the circuit clerk "does not have any supervisory or other direct employment relationship with the Magistrate Clerk," discovery may reveal that the proper functioning of the judicial system required Ms. Smith and the incumbent circuit clerk to work closely together. If the evidence demonstrates that Judge Frye feared that Greg Smith's candidacy would disrupt that relationship, he may well have violated no constitutional provision in discharging Ms. Smith. However, no evidence yet supports this conclusion.

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affiliation and/or views. Rather than being "attenuated," *id.*, this claim sounds in the heart of the *First Amendment. See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)* ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics . . . or other matters of opinion . . . .").

Similarly, although some clerks have purely ministerial and administrative duties, others make policy or enjoy a confidential relationship to their superiors, and as the majority acknowledges, *ante* at 7 n.3, nothing in the record to date informs us as to which category Ms. Smith's position belonged. If Ms. Smith's duties were of the ministerial sort, her political beliefs and affiliations were plainly irrelevant to "effective performance" of her job. On the other hand, if discovery were to produce evidence indicating that Ms. Smith made policy, those beliefs might well be an "appropriate" job requirement.

But at this juncture there has been *no* discovery and so we have *no* basis for holding that her discharge can be justified. Rather, we must read the allegations in the complaint in the light most favorable to Ms. Smith; if that is done, she undoubtedly has alleged a cause of action under the *First Amendment*.

II.

I agree with the majority, however, that Ms. Smith has not alleged a violation of clearly established law. Our determination of whether law is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)*. "[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne, 526 U.S. 603, 615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)*. "[T]he focus is on whether the [official] had fair notice that [his] conduct was unlawful." *Brosseau v. Haugen, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004)*.

The most apposite Supreme Court cases, *Elrod* and *Branti*, address traditional political patronage practices quite unlike Ms. Smith's allegations. And as the majority persuasively explains, our court and others have usually applied the *First Amendment*

principles articulated in *Elrod* and *Branti* to patronage situations. *See ante* 7-9. Of course, there need not be a case directly on point for the law to be clearly established for qualified immunity purposes. *Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)*; *Buonocore v. Harris, 65 F.3d 347, 356-57 (4th Cir. 1995)*. But Ms. Smith has not cited, and we have not found, a single case in which any court, prior to February 2004 (the date of Ms. Smith's discharge), had recognized a claim similar to hers. That is, no court had allowed a claim that a discharge violated the *First Amendment not* because the employer was clearing positions for his own supporters or punishing an employee for her political activity, but because the employer was "angry" at the employee due to her relative's candidacy and, absent any conduct on her part, because he "believed" that she supported her relative, "not the incumbent circuit clerk."

This may be an unfair reason for firing Ms. Smith but, because she was an at-will employee, Judge Frye could fire her for no reason or any reason at all--except an unlawful reason. I believe that she has alleged facts sufficient to make out a claim that the firing was unlawful; but given the dearth of authority to that effect, I cannot conclude that Judge Frye was on "fair notice" of this. As such, Judge Frye is entitled to qualified immunity.

For this reason, I agree with the majority that we must uphold the dismissal of the complaint.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 15, 2007

No. 06-1801
2:06-cv-00014-DAF

MARY LOU SMITH; GREG SMITH
Plaintiffs - Appellants

v.

HONORABLE ANDREW N. FRYE, JR.
Defendant - Appellee

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to t his Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Niemeyer, Judge Motz, and Judge Duncan.

For the Court,
/s/ Patricia S. Connor
CLERK

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MARY LOU SMITH, et al., Plaintiffs, v. HONORABLE ANDREW N. FRYE, JR., Defendant.

CIVIL ACTION NO. 2:06-0014

2006 U.S. Dist. LEXIS 39909

June 14, 2006, Decided

SUBSEQUENT HISTORY: Affirmed by *Smith v. Frye, 2007 U.S. App. LEXIS 11632 (4th Cir. W. Va., May 18, 2007)*

COUNSEL: For Mary Lou Smith, Greg Smith, Plaintiffs: Allan N. Karlin, Sophie E. Zdatny, Allan N. Karlin & Associates, Morgantown, WV.

For Honorable Andrew N. Frye, Jr., Defendant: John M. Hedges, Byrne & Hedges, Morgantown, WV.

JUDGES: David A. Faber, United States District Judge.

OPINION BY: David A. Faber

OPINION

MEMORANDUM OPINION

Pending before the court is defendant's motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure (Doc. No. 7).[1] Plaintiffs filed a response to defendant's motion, and this motion is now ripe for adjudication. Having reviewed the record and applicable case law, by accompanying Judgment Order, defendant's motion to dismiss (Doc. No. 7) is hereby granted. The Clerk is directed to strike this case from the active docket of the court.

A. Factual Background

In November 2002, plaintiff Mary Lou Smith was hired as the Clerk of the Magistrate Court of Mineral County, West Virginia. (*See* Doc. No. 1 ¶7.) In that position, Mary Lou Smith was under defendant's supervision in his capacity as the Chief Judge of the 21st Judicial Circuit of West Virginia. (*See id.* ¶8.) Mary Lou Smith avers that, as of January 2004, defendant had never told her, or anyone else, that he had concerns about her work, and that no complaints about her performance had been made by anyone. (*See id.* ¶¶14-15.)

On January 30, 2004, plaintiff Greg Smith filed to run for the position of Circuit Clerk in the upcoming Republican Party primary against the incumbent Circuit Clerk of Mineral County. (*See id.* ¶10.) Greg Smith is Mary Lou Smith's oldest son and was thirty years old as of that time. (*Id.*) Plaintiffs aver that, after Greg Smith filed candidacy papers, defendant told another judge that he wanted to fire Mary Lou Smith because her son

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[1] Also pending before the court is plaintiffs' motion for leave to file a surreply. (*See* Doc. No. 11.) For reasons appearing to the court, plaintiffs' motion for leave to file a surreply (Doc. No. 11) is granted, and the court will consider plaintiffs' surreply in evaluating defendant's motion to dismiss.

had filed for the office of circuit clerk. (*Id.* ¶12.) Moreover, according to this other judge, defendant was angry at Mary Lou Smith because of her son's candidacy. (*Id.* ¶13.)

Defendant terminated Mary Lou Smith as of February 5, 2004. (*See id.* ¶¶16-17.) Plaintiffs contend that Mary Lou Smith was fired because defendant believed that Mary Lou Smith would support her son, and not the incumbent circuit clerk in the upcoming election. (*Id.* ¶18.)

Following her termination, Smith requested a hearing under the personnel policies of the West Virginia Supreme Court of Appeals. (*Id.* ¶19.) Plaintiffs indicate that the hearing is provided by the Supreme Court in the court's capacity as an employer, and that the hearings are not judicial proceedings. (*Id.* ¶21.) At this hearing, defendant insisted that he had no reason whatsoever for firing Mary Lou Smith. (*Id.* ¶26.) Defendant's statements were opposed by those of the other judge who testified that defendant had said that he was going to fire Mary Lou Smith because her son had filed for the primary election against the incumbent circuit clerk. (*Id.* ¶24.) Defendant responded to the other judge's testimony with only the assertion that he did not recall any such conversation. (*Id.* ¶25.)

The hearing officer concluded that Mary Lou Smith would not have been discharged had her son not become a candidate for circuit clerk, but that her discharge did not violate state or federal law. (*See id.* ¶29.) Mary Lou Smith disagreed with this conclusion following the hearing, and continued to disagree with it at the time the Complaint was filed. (*Id.* ¶30.) Following several further levels of administrative review, Mary Lou Smith's discharge was upheld by the Supreme Court of West Virginia. (*See id.* ¶¶38-39.)

In his motion to dismiss, defendant contends that plaintiff Greg Smith's claims against him should be denied because

either Greg Smith suffered no "injury in fact" or because his injuries are de minimis.[2] (*See* Doc. No. 7 at 15-19.) Defendant contends that plaintiff Mary Lou Smith's claims are barred by the doctrine of qualified immunity, that her claims fail to state a claim for wrongful discharge or retaliation based upon the violation of a substantial public policy, and that her claims are barred under principles of claim preclusion as they were already addressed by the West Virginia Supreme Court of Appeals. (*Id.* at 9-15, 19-21.) The court later examines defendant's arguments in turn.

B. Standard of Review

Defendant has moved for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. To succeed on a motion to dismiss under Rule 12(b)(6), defendants must demonstrate that plaintiffs' claims are "so insubstantial, implausible, foreclosed by prior decisions of the [Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Dismissal is appropriate where plaintiffs can prove no set of facts that would support their claims. *Flood v. New Hanover County,* 125 F.3d 249, 252 (4th Cir. 1987).

A Rule 12(b)(6) motion tests the sufficiency of the pleading. It does not resolve factual disputes, "the merits of a

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[2] Defendant also contended that, insofar as plaintiffs asserted claims against him in his official capacity, any such claims were barred by the Eleventh Amendment to the United States Constitution. (*See* Doc. No. 7 at 4-5.) In their response, plaintiffs indicated that their claims were against defendant in his individual capacity. (*See* Doc. No. 9-1 at 8.) As such, the portion of defendant's motion to dismiss discussing Eleventh Amendment immunity and official capacity must be denied as moot.

claim, or the applicability of defenses." *Republican Party of North Carolina v. Martin,* 980 F.2d 943, 952 (4th Cir. 1992) (citations omitted). In considering the motion, the claims must be viewed in the light most favorable to the non-moving party and all allegations in the complaint accepted as true. *Id.* Dismissal is appropriate only when it appears beyond a doubt that no set of facts would entitle the pleader to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

C. Analysis

1. Defendant's Motion to Dismiss regarding Greg Smith

a. Claims under 42 U.S.C. § 1983

Under Article III of the United States Constitution, it is a well-settled principle that "a plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). It is incumbent upon every plaintiff to establish standing to prosecute a civil action. *Elk Grove School Dist. v. Newdow,* 542 U.S. 1, 11, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute." *Warth,* 422 U.S. at 498. Particularly, the elements of standing include three elements:

> First, a plaintiff must demonstrate an "injury in fact," which is "concrete," "distinct and palpable," and "actual or imminent." Second, a plaintiff must establish "a causal connection between the injury and the conduct complained of - the injury has to be 'fairly traceable to the challenged action of the defendant, and not . . . the result [of] some third

> party not before the court." Third, a plaintiff must show the "'substantial likelihood' that the requested relief will remedy the alleged injury in fact."

McConnell v. FEC, 540 U.S. 93, 225-26, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003).

It is clear that plaintiff Greg Smith does not have standing to contest damages resulting from the major issue present in this case, that is, his mother's dismissal from her job as a magistrate clerk in Mineral County, West Virginia. He cannot sue to get her job back; she has to do this herself.

In his motion to dismiss, defendant avers as much; he contends that Greg Smith has either suffered no actual injury, or that the injuries he suffered were de minimis.[3] (Doc. No. 7 at 9-15.) Defendant contends that Greg Smith cannot allege that his candidacy was affected in any concrete way by the termination of his mother's employment, and that a "speculative and subjective claim of 'chilling' of his [political] rights" is insufficient to confer standing upon Greg Smith. (*Id.* at 16.) In response, Greg Smith avers that he has standing to assert the claims raised in the Complaint because "a person of ordinary firmness would be chilled from exercising his rights, where, as here, the state employment of his close relative was terminated because he filed to run for political office." (*See* Doc. No. 9 at 15) (discussing *Constantine v. Rectors & Visitors of George*

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[3] As defendant notes, "a trivial or de minimis injury will not support a retaliatory prosecution claim." *Poole v. Otero*, 271 F.3d 955, 960 (10th Cir. 2001), overruled in part by *Hartman v. Moore*, 126 S. Ct. 1695, 1701, 164 L. Ed. 2d 441 (2006). However, a review of the entirety of the Poole decision leads to the conclusion that, insofar as the general contours of retaliation are concerned, any injury that causes "chilling" is not de minimis.

Mason Univ., 411 F.3d 474, 498 (4th Cir. 2005)). Under Fourth Circuit precedent, "for purposes of a First Amendment retaliation claim under § 1983, a plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter 'a person of ordinary firmness' from the exercise of First Amendment rights." *Constantine*, 411 F.3d at 500 (listing cases from other circuits). In *Constantine*, the Fourth Circuit noted that the "ordinary firmness" standard is objective.

> We have never held that a plaintiff must prove that the allegedly retaliatory conduct caused her to cease First Amendment activity altogether. The cause of action targets conduct that tends to *chill* such activity, not just conduct that *freezes* it completely. Moreover, such a subjective standard would expose public officials to liability in some cases, but not in others, for the very same conduct, depending on the plaintiff's will to fight. We believe that an objective standard better instructs public officials as to the obligations under the First Amendment.

Id.

Plaintiffs argue that West Virginia recognizes that the right to run for public office is a valuable and fundamental right, and that retaliatory actions of the sort defendant is alleged to have taken, would "certainly chill a person of ordinary firmness from exercising his right to file for public office." (*See* Doc. No. 9 at 17.) Greg Smith contends that he does not have to show actual effects of defendant's allegedly unconstitutional conduct, (*Id.*) Alternatively, Greg Smith contends that compensatory damages in a retaliation claim under § 1983 may include embarrassment, humiliation, and emotional distress, and that he suffered such damages, and that these damages fulfill the "injury in fact" requirement. (*See id.* at 18) (citing *Bloch v. Ribar*, 156 F.3d

673, 679 (6th Cir. 1998) (collecting authorities on the issue of compensable issues in § 1983 retaliation cases)). As such, defendant's motion to dismiss based on Greg Smith's standing and ostensibly de minimis injuries must be denied.

In response, defendant contends that Greg Smith must show a concrete or particularized injury to his own personal legal rights before his claims are allowed to proceed. (*See* Doc. No. 10 at 10.) Assuming the truth of the allegations in the Complaint, defendant argues, only Mary Lou Smith was injured in a legal sense by defendant's actions. (*Id.*) Defendant's right to be a candidate for public office was not adversely affected in any way. (*Id.*) On this basis, defendant distinguishes this case from Constantine where a plaintiff who publicly criticized a law school professor's grade appeal policies was also the same person who had to retake an exam. (*Id.*) Defendant also distinguishes *Bloch v. Ribar* based on facts. (*Id.*) In *Bloch*, a sheriff "publicly revealed the extremely humiliating details of a rape after the victim publicly criticized him for failing to conduct an appropriate investigation." (*Id.*)

The court accepts defendant's arguments regarding Greg Smith nearly in their entirety. Greg Smith cannot have standing based solely on the assertion that his political rights were ostensibly "chilled." Similarly, he has not alleged an injury in fact for a actual injury that was, in reality, inflicted entirely upon his mother. She lost her job; his candidacy continued. For Greg Smith to have standing, he would have to be injured in a some way recognized by the law that is independent of his mother's injury. Here, Greg Smith contends that he was injured because his mother's discharge caused him to suffer indignity, embarrassment, humiliation, and emotional distress. Common law principles bar such claims as he has alleged here from succeeding.

It is an age-old principle in tort law that one cannot collect for emotional damage or humiliation occasioned by harm done

to a family member absent fairly particular circumstances.[4] Although Greg Smith's claim has a constitutional basis, it is at its root a tort. The Restatement (Second) of Torts § 46, comment (1), notes that it is important to limit the scope of persons who can recover damages for emotional distress caused by intentional actions. Specifically, the Restatement notes that the trend in decided cases is that liability for intentional infliction of emotional distress

> is limited . . . to plaintiffs who were present at the time, as distinguished from those who discover later what has occurred. The limitation maybe justified by the practical necessity of drawing the line somewhere, since the number of persons who may suffer emotional distress at the news of an assassination of the President is virtually unlimited, and the distress of a woman who is informed of her husband's murder ten years

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[4] Under West Virginia law, a third party may recover for intentional infliction of emotional distress damages if:

> (1) defendant's conduct was extreme and outrageous; (2) such conduct was directed at the third party; (3) the plaintiff is a member of the third party's immediate family; (4) the plaintiff was physically present when the extreme and outrageous conduct took place; (5) the plaintiff suffered severe emotional distress as a result of the conduct.

See, e.g., Courtney v. Courtney, 186 W. Va. 597, 601, 413 S.E.2d 418, 422 (1991). Although it is clear that this is not determinative for plaintiff's cause of action here, it is illustrative of the fact that emotional damages resulting from tortious conduct are difficult to receive.

> afterward may lack the guarantee of genuineness which her presence on the spot would afford.

Id.

The court can see no reason why this general principle in tort law is inapplicable in this case. Allowing an adult son to collect for emotional damages and humiliation resulting from his mother's discharge from her employment casts the net of possible liability too broadly. A party can only collect damages for their own discharge, and not for the discharge of a family member or ostensible political supporter. If one were to follow Greg Smith's argument to its logical conclusion, someone would be able to collect on a tort inflicted on his family member. This cannot happen. The court finds that plaintiff Greg Smith's allegations that he suffered indignity, embarrassment, humiliation, and emotional distress as a result of his mother's unlawful termination are not a sufficient "injury in fact" under Article III of the United States Constitution.

Bloch v. Ribar, 156 F.3d 673, 679 (6th Cir. 1998), upon which plaintiff relies to show that he has suffered an "injury in fact," is distinguishable on its facts from this case. In *Bloch*, the plaintiff sued for emotional damages and humiliation that occurred to her. *See* 156 F.3d at 676. Although *Bloch* collects cases and has been cited approvingly by the Fourth Circuit, nothing in it stands for the proposition that a party can claim damages based on emotional damage or humiliation that has occurred resulting from harms occurring to a family member. *See Jennings v. Univ. of N.C.*, 444 F.3d 255, (4th Cir. 2006) (citing *Bloch* for the proposition that being forced to reveal information regarding sexual conduct may implicate a person's interest in avoiding the disclosure of personal matters); *Constantine v. Records & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005) (same). Similarly, no decision of which the court is aware has awarded damages for emotional

harm or humiliation to the family member of a person who was unconstitutionally discharged. The principle distinguishing this case from every other case this court has reviewed is Greg Smith's position as a third party.

The combination of Smith's status as son and political candidate, although exceedingly troubling, does not provide enough of a nexus to give him standing to sue here. As such, defendant's motion to dismiss Greg Smith's claims under 42 U.S.C. § 1983 must be dismissed.

b. State Law Claims

Greg Smith also raises claims under state law. (*See* Doc. No. 1 ¶46.) Specifically, Greg Smith alleges that defendant's discharge of Mary Lou Smith, Greg Smith's mother, following his announcement of his candidacy for Mineral County Circuit Clerk violated his rights under West Virginia public policy and the West Virginia Constitution. These state law claims are only before the court pursuant to 28 U.S.C. § 1367, which grants this court supplemental jurisdiction over "all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy" as the other claims that grant the court jurisdiction under Article III of the United States Constitution.

Although a court that has dismissed federal claims has the ability to retain jurisdiction over closely related state law claims, the court has the discretion to decline to exercise supplemental jurisdiction over claims outside its original jurisdiction. *See* 28 U.S.C. § 1367(c)(3); *Shanaghan v. Cahill,* 58 F.3d 106, 110 (4th Cir. 1995) (stating that district courts "enjoy wide latitude in determining whether or not to retain jurisdiction over state law claims when all federal law claims have been extinguished."). To determine whether to retain jurisdiction over state law claims, the court should consider "convenience and fairness to the parties, the existence of any

underlying issues of federal policy, comity, and considerations of judicial economy." *Semple v. City of Moundsville*, 195 F.3d 708, 714 (4th Cir. 1999).

Although the court finds the allegations contained in the Complaint regarding defendant's actions toward Greg Smith extremely troubling, the court declines to continue jurisdiction over Greg Smith's claims arising under state law. As such, the court orders these claims dismissed without prejudice.

2. Defendant's Motion to Dismiss regarding Mary Lou Smith

a. Claim under 42 U.S.C. § 1983

The court moves to defendant's motion to dismiss regarding Mary Lou Smith. In his motion, defendant contends that plaintiff Mary Lou Smith's claims are barred by the doctrine of qualified immunity, that her claims fail to state a claim for wrongful discharge or retaliation based upon the violation of a substantial public policy, and that her claims are barred under principles of claim preclusion as they were already addressed by the West Virginia Supreme Court of Appeals. (*See* Doc. No. 7 at 9-15, 19-21.)

Having examined these arguments and applicable case law, the court grants defendant's motion to dismiss as to Mary Lou Smith because defendant has failed to plead a claim upon which relief can be granted. Dismissal under Federal Rule of Civil Procedure 12(b)(6) is appropriate in such situations. *See Flood v. New Hanover County,* 125 F.3d 249, 252 (4th Cir. 1987). Federal courts have limited jurisdiction, possessing only the powers authorized by the United States Constitution and prescribed under statute. See *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). Here, plaintiff avers that her rights under the First and Fourteenth Amendments of the United States Constitution

were violated when defendant terminated her because her son chose to run for public office. (*See* Doc. No. 1 ¶45.) However, plaintiff does not allege that she took any action to support her son's candidacy, or that she exercised rights granted to her under the United States Constitution whatsoever. Her failure to allege that she exercised a constitutionally protected right is fatal to the claim she attempts to allege.

It is well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers,* 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); see also *Garcetti v. Ceballos,* 126 S. Ct. 1951, 164 L. Ed. 2d 689, 2006 U.S. LEXIS 4341, at *7 (U.S. 2006). A public employer contravenes an employee's First Amendment free speech rights when it discharges or "refuses to rehire [the] employee" or when it makes decisions relating to "promotion, transfer, recall, and hiring based on the exercise of" that employee's free speech rights. *Ridpath v. Bd. of Governors Marshall Univ.,* 447 F.3d 292, 2006 U.S. App. LEXIS 11693, at *50-51 (4th Cir. May 11, 2006) (quoting *Suarez Corp. v. McGraw,* 202 F.3d 676, 686 (4th Cir. 2000) (internal quotation marks omitted)). In order to prove that a retaliatory employment action violated a public employee's free speech rights, the employee must satisfy the three-prong test laid out in *McVey v. Stacy,* 157 F.3d 271, 277-78 (4th Cir. 1998). Under *McVey,* first, the employee must speak out as a citizen, not as an employee, on a matter of public concern. *Id.* at 277. Second, the employee's interest in the expression at issue must have outweighed the employer's "interest in providing effective and efficient services to the public." *Id.* Third, there must have been a sufficient causal nexus between the protected speech and the retaliatory employment action. *Id.* at 277-78 n.26.

Here, there are no allegations that Mary Lou Smith ever said or did anything in support of her son's candidacy.[5] The Complaint alleges that defendant's actions were not to chill Mary Lou Smith's rights, but instead to chill the rights of her son. All of the case law surrounding retaliation claims under the First Amendment to the United States Constitution focuses on situations where an employee has already spoken out and exercised her constitutional rights, there is little guidance for situations where, as here, the retaliation happens before any statements, or associational conduct, ever happened. See *Ridpath*, 2006 U.S. App. LEXIS 11693, at *63 (listing cases where an employee was fired after having made statements that their employer disagreed with).

In her brief, plaintiff contends that an employer's perception that an employee has engaged in protective speech is enough to

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[5] Although the concern is entirely theoretical, it is also clear that plaintiff has no apparent, valid claim under the Equal Protection Clause. The Equal Protection Clause provides that "no State shall . . . deny to any persons within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV. It is clear that a "pure or generic retaliation claim . . . simply does not implicate the Equal Protection Clause." *See Edwards v. City of Goldsboro*, 178 F.3d 231, 250 (4th Cir. 1999) (quoting *Watkins v. Bowden*, 105 F.3d 1344, 1354 (11th Cir. 1997)). Plaintiff's claim here is such a generic retaliation claim. The only plausible claim that plaintiff may have is that she is a member of a "class of one" who has been intentionally treated differently than other similarly situated persons, and that there is no rational basis for the difference in treatment. *See, e.g., Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000); *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 446, 43 S. Ct. 190, 67 L. Ed. 340 (1923). However, plaintiff pleaded no such claim, and it would likely fail when confronted with plaintiff's status as an at will employee

present a First Amendment retaliation claim.[6] (*See* Doc. No. 9 at 11 n.7.) Plaintiff notes that:

> In other contexts courts have rejected similar defenses recognizing that the defendant's perception that plaintiff has engaged in protected activity is sufficient to state a cause of action. *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 565 (3d Cir. 2002) ("We also believe that [plaintiff's] perception theory of illegal retaliation - that he was fired because Mercy thought that he was engaged in protected activity, even if he actually was not - presents a valid legal claim. Because the statutes forbid an employer's taking action against an employee for discriminatory reasons," it does not matter that the factual basis for the employer's discriminatory animus was correct and that, so long as the employer's specific intent was discriminatory, the retaliation is actionable."); *Grosso v. City Univ.*, 2005 U.S. Dist. LEXIS 4089, at *9 (S.D.N.Y. Mar. 14, 2005) ("Defendants provide no authority that holds the perception theory of retaliation is invalid. Moreover, we find that the language of 42 U.S.C. § 2000e-3(a) is consistent with the 'perception theory' of retaliatory discrimination. Thus, we believe plaintiff states a valid claim for retaliatory discrimination based on culpable behavior before plaintiff engaged in protected activity to the extent

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[6] Plaintiff refers to this as "defendant's mistake of fact defense." As will be discussed herein, it is not defendant's defense, but that plaintiff has pleaded essentially a "preemptive retaliation" claim.

> that the behavior was motivated by their belief that plaintiff had already done so.").

(*Id.*)

As plaintiff notes, neither *Fogelman* nor *Grosso* are First Amendment retaliation cases. They are both premised on the language of particular statutes, neither of which is 42 U.S.C. § 1983, the statutory basis here. In *Fogelman*, after a father filed a separate action alleging that he was forced out of his job due to age and disability discrimination, a son, who worked for the same employer, raised claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, and the Pennsylvania Human Rights Act, 43 Pa. Cons. Stat. §§ 951-963, alleging that he had been fired in retaliation for the action filed by his father. *See* 283 F.3d at 564. To reach its eventual conclusion, the Third Circuit construed the language of the three statutes plaintiff sued under, and found that certain language in the ADA permitted plaintiff to file suit. *See id.* at 564, 570-71.[7] However, the court found that, because of the phrasing of the other statutes plaintiff attempted to sue under,

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[7] The relevant portion of the ADA, 42 U.S.C. § 12203(b), provides that

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected under this chapter.

The Third Circuit specifically noted that it was construing this section in reaching its eventual conclusion that plaintiff's suit under the ADA was permitted. *See* 283 F.3d at 561.

his causes of action under them must be dismissed. *Id.* at 565-70.

Grosso also focuses on particular statutory language, specifically 42 U.S.C. § 2000e-3(a). In Grosso, plaintiff alleged that he was subjected to a hostile work environment for assisting plaintiffs Drs. Gloria L. Salerno and Emelise Aleandri in a Title VII action. *See* 2005 U.S. Dist. LEXIS 4089, at *5-6. Plaintiff's theory was that defendants subjected him to a hostile work environment because they believed he had engaged in a protected action - even before he had actually done so. *Id.* 2005 U.S. Dist. LEXIS 4089, at *6. In resolving defendant's motion to dismiss, the court examined *Fogelman* and the language of 42 U.S.C. § 2000e-3(a).[8] *See id.* 2005 U.S. Dist. LEXIS 4089, at *9-10.

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[8] It appears that the Grosso court actually misapplied Fogelman as it states that Fogelman approved the involved plaintiff's claims under both the ADA and the ADEA. See *Grosso, 2005 U.S. Dist. LEXIS at *8-10* (discussing *Fogelman, 283 F.3d at 561, 571)*. As noted above, in Fogelman, the Third Circuit only allowed one ADA claim to continue. The Grosso court also relies on the bald assertion that *42 U.S.C. § 2000e-3* is consistent with a "perception theory" of retaliatory discrimination, without providing any indication of where in that statute that theory has its basis. See *id. at *9*.

Sauers v. Salt Lake County, 1 F.3d 1122, 1128 (10th Cir. 1993), provides a more reasoned analysis of "preemptive retaliation" under *42 U.S.C. § 2000e-3*. The Sauer court makes it clear, as did Fogelman, that "preemptive retaliation" claims must have a statutory basis. *Id.* (stating that "[a]ction taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact; consequently, we hold that this form of pre-emptive retaliation falls within the scope of *42 U.S.C. 2000e-3*.").

Plaintiff's claim here sounds under 42 U.S.C. § 1983, alleging violations of her rights under the First and Fourteenth Amendments to the United States Constitution. (*See* Doc. No. 1 ¶45.) The court is aware of no authority supporting the proposition that a party can show a violation of her First or Fourteenth Amendment rights, actionable under 42 U.S.C. § 1983, without the party having engaged in some activity protected under the United States Constitution. In relevant part, Section 1983 provides that:

> Every person who . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States], shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

The language contained in this statute is far narrower than the language contained in statutes such as 42 U.S.C. § 12203(b) or 42 U.S.C. § 2000e-3 which have been used to allow claims based on "preemptive retaliation. " That Mary Lou Smith never exercised any constitutionally guaranteed right prior to the termination of her employment is fatal to her claim given the language of 42 U.S.C. § 1983.[9] The conduct alleged in the

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[9] Indeed, even if the language of 42 U.S.C. § 1983 were identical to 42 U.S.C. § 12203(b) or 42 U.S.C. § 2000e-3, her pleadings would not sound a claim. Under Section 12203(b), plaintiff would have had to plead that she "aided or encouraged" her son to exercise his rights. *See id.* Similarly, Section 2000e-3 would require her to take some action such as making a charge, or even assisting, a party to show a violation. *See* 42 U.S.C. § 2000e-3(a);

Complaint does not sound a federal claim as to plaintiff Mary Lou Smith because being a family member of someone who runs for office does not appear to be protected under the United States Constitution, and this is all she pleaded.[10] As such, defendant's motion to dismiss Mary Lou Smith's claims under 42 U.S.C. § 1983 must be granted.

b. Claims under State Law

In her Complaint, plaintiff Mary Lou Smith also states claims sounding under the laws of the State of West Virginia. (*See* Doc. No. 1 ¶45) (stating, in part, that defendant's actions violated plaintiff's rights under Article III §§ 1,7, and 16 of the West Virginia Constitution). These state law claims are only before the court pursuant to 28 U.S.C. § 1367, which grants this court supplemental jurisdiction over "all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy" as the other

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Jennings v. Tinley Park Cmty. Consol. Sch. Dist., 796 F.2d 962, 966-67 (7th Cir. 1986) (stating that the first element in a prima facie case of retaliatory discrimination a plaintiff must show is that they engaged in a statutorily protected form of expression).

[10] All of the retaliation cases under Section 1983 of which this court is aware require a plaintiff to show that they engaged in some form of protected activity before having a valid claim. *See. e.g.*, *Elrod v. Burns*, 427 U.S. 347, 350, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (finding that membership, or nonmembership in a political party was an activity protected by the First Amendment); *Rutan v. Republican Party*, 497 U.S. 62, 64-65, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990); *Pike v. Osborne*, 301 F.3d 182, 185 (4th Cir. 202) (supporting another candidate implicated First Amendment Rights); *Sales v. Grant*, 158 F.3d 768, 779 (4th Cir. 1998) (same). There appears to be no authority that support of a political candidate may be inferred from a familial relationship with said candidate.

claims that grant the court jurisdiction under Article III of the United States Constitution.

As the court noted above regarding Greg Smith, it has discretion to accept or reject the remaining claims against defendant alleged by Mary Lou Smith. These questions remaining include difficult issues of state law that are better handled by state courts. Indeed, this dispute has already once been before the West Virginia Supreme Court of Appeals, if in an administrative, and not a judicial capacity. The court believes that Mary Lou Smith's claims under public policies of the State of West Virginia and the West Virginia Constitution are better handled by the courts of the State of West Virginia. Although it is moderately troubling to this court that any state judge who hears this dispute will likely have a relationship with defendant, any judge whose relationship with defendant would cause an appearance of impropriety would recuse themselves. This provides no reason for this court to keep jurisdiction over the state claims averred in the Complaint. As such, pursuant to 28 U.S.C. § 1367(c)(3), the court declines to exercise jurisdiction over these claims, and such claims are hereby dismissed without prejudice.

D. Conclusion

For the reasons outlined above, defendant's motion to dismiss (Doc. No. 7) is hereby granted.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is SO ORDERED this 14th day of June, 2006.

David A. Faber

United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MARY LOU SMITH and,
GREG SMITH,

Plaintiffs,

v. CIVIL ACTION NO. _____

ANDREW N. FRYE, JR.,
Defendant.

COMPLAINT

Introduction

1. Mary Lou Smith and Greg Smith bring this case against Andrew N. Frye, Jr., Judge of the 21st Circuit of West Virginia, alleging violations of their rights under state and federal law. The case arises out of the decision of Andrew N. Frye, then Chief Judge of the 21st Circuit, to fire Mary Lou Smith from her position as Magistrate Court Clerk of Mineral County solely because her son, Greg Smith, filed to run for office in the primary election against the incumbent Circuit Clerk of Mineral County.

Jurisdiction

2. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343 and has supplemental jurisdiction over this matter pursuant to 28 U.S.C. § 1367.

Venue

3. Venue lies in the Northern District of West Virginia pursuant to 28 U.S.C. § 1391.

Parties

4. Mary Lou Smith is, and has been at all times relevant herein, a resident of Mineral County, West Virginia.

5. Greg Smith is, and has been at all times relevant herein, a resident of Mineral County, West Virginia, and is the adult son of Mary Lou Smith.

6. Judge Frye is, and has been at all times relevant herein, a resident of Grant County, West Virginia.

Facts

7. Mary Lou Smith was hired as Clerk of the Magistrate Court of Mineral County, West Virginia in November 2002.

8. In her position as Magistrate Court Clerk, Ms. Smith was under the supervision of the Chief Judge of the 21st Judicial Circuit of West Virginia.

9. Andrew N. Frye, Jr., was the Chief Judge of the 21st Judicial Circuit of West Virginia in 2004.

10. On January 30, 2004, Ms. Smith's oldest son, Greg Smith, then age 30, filed to run for the position of Circuit Clerk in the upcoming Republican Party primary against the incumbent Circuit Clerk of Mineral County.

11. The Circuit Clerk does not have any supervisory or other direct employment relationship with the Magistrate Clerk.

12. On January 30, 2004, shortly after learning that Greg Smith had filed to run for circuit clerk, the defendant, Judge Frye, told Judge Philip B. Jordan, Jr., the other judge of

the 21st Judicial Circuit, that he wanted to fire Ms. Smith because her son had filed to run for circuit clerk.

13. At the time that the defendant told Judge Jordan of his intent to fire Ms. Smith, the defendant, according to Judge Jordan, was angry at Ms. Smith because of her son's candidacy for the position of circuit clerk.

14. Prior to this date, the defendant had never told Ms. Smith or anyone else that he had any concerns about her or her work.

15. Prior to this date, no complaints had been made by anyone about Ms. Smith's performance as the Magistrate Clerk; to the contrary, she was widely respected by everyone with whom she worked.

16. Judge Jordan tried to dissuade the defendant from firing Ms. Smith, advising the defendant that he, Judge Jordan, did not think it was the right thing to do.

17. On February 5, 2004, the defendant terminated Ms. Smith's employment in a letter he hand-delivered to Ms. Smith at her desk in the offices of the Magistrate Court.

18. The defendant fired Ms. Smith because her son, Greg Smith, had filed to run against the incumbent Circuit Clerk in the Republican Party primary and because the defendant believed that Ms. Smith supported her son, not the incumbent circuit clerk.

19. Subsequent to the firing, Ms. Smith requested a hearing under the personnel policies of the West Virginia Supreme Court of Appeals ("Supreme Court").

20. The personnel policies of the Supreme Court include an administrative appeal procedure for judicial employees.

21. This appeal procedure is provided by the Supreme Court in the Court's capacity as an employer; the appeal procedures are not judicial proceedings.

22. Under the Supreme Court's personnel procedures, Ms. Smith was entitled to a hearing before a

hearing officer who would make recommendations to the Administrative Director of the Supreme Court or to his designee.

23. Prior to her hearing, Ms. Smith objected to the constitutionality of the proceeding and, in particular, to the fact that the Judge who was appointed to conduct the hearing denied Ms. Smith's request to require the defendant to disclose his reason for firing Ms. Smith prior to the hearing.

24. At the administrative hearing, Judge Jordan, who was called as a witness by Ms. Smith, testified that the defendant said that he was going to fire Ms. Smith because her son had filed to run in the primary election against the incumbent Circuit Clerk.

25. The defendant did not disagree with Judge Jordan's testimony about what he, the defendant, had said. Instead, the defendant testified that he did not recall the details of his conversations with Judge Jordan.

26. When the defendant was asked why he fired Ms. Smith, he did not provide a reason for his decision, insisting, instead, that he did not have a reason or a motive for his decision to fire her.

27. The defendant claimed that he had been planning to fire Ms. Smith prior to learning of her son's decision to run for circuit clerk and that he had, in fact, requested a model termination letter from the Administrative Office of the Supreme Court approximately three to four weeks before the date, February 5, 2004, that he terminated Ms. Smith's employment.

28. However, James Albert, the Interim Director of the Administrative Office, contradicted the defendant's testimony. Mr. Albert testified that, according to his own records, the defendant spoke to him about firing Ms. Smith on February 4, 2004, *i.e.*, five days after Greg Smith filed his candidacy papers and one day before Ms. Smith was

terminated, not, as the defendant claimed, three to four weeks before Ms. Smith was terminated from her employment.

29. Subsequent to the hearing, the hearing officer, a senior status judge, concluded that Ms Smith "would not have been discharged from her judicial employment on February 5, 2004, if her son had not become a candidate for circuit clerk, but that such discharge did not violate state or federal law."

30. The hearing officer was incorrect, as a matter of law, in concluding that the discharge of Ms. Smith because her son filed to run for the position of circuit clerk did not violate state or federal law.

31. Under the personnel policies of the West Virginia Supreme Court of Appeals, the decision on Ms. Smith's administrative appeal is made by the Administrative Director of the Court or his designee who must decide whether to affirm or reverse the recommendation of the hearing officer.

32. In Ms. Smith's case, the decision was made by a designee of the Interim Administrative Director.

33. The designee of the Interim Administrative Director denied Ms. Smith's request to submit a legal memorandum to demonstrate why the hearing examiner's recommendation was incorrect as a matter of law.

34. Although the termination of Ms. Smith because of her son's candidacy is contrary to state and federal law, the hearing examiner's recommendation was adopted by the designee of the Administrative Director of the Supreme Court.

35. Although Ms. Smith requested an "administrative review" of the decision by the Supreme Court, pursuant to the Supreme Court's internal personnel policies, the Supreme Court denied Ms. Smith's petition for administrative review.

36. Under the Supreme Court's personnel policies, the Court's denial of review was "an administrative action."

37. The decision upholding the termination of Ms. Smith was contrary to law and the fact finding, in part, was arbitrary, capricious, grossly erroneous and not supported by substantial evidence insofar as it purported to find reasons for the defendant's decision to fire Ms. Smith when the defendant, in fact, testified that he had had no reason for firing her.

38. The hearing and other proceedings in which Ms. Smith participated were not judicial proceedings and, therefore, there has never been a full and final adjudication of the facts and of the law applicable to Ms. Smith's termination from employment; nor did Ms. Smith have any further appeal from the internal administrative review of her termination after the Supreme Court chose not to review the decision of the Administrative Director.

39. The internal appeal procedures under the Supreme Court's personnel policies are designed to be simple and expeditions, do not permit discovery, and do not provide the full panoply of rights available under a judicial proceeding.

40. In terminating the employment of Ms. Smith, the defendant was acting under color of law in his administrative, not judicial, capacity.

41. As a direct and proximate result of the firing of Mary Lou Smith, the rights of Greg Smith and others similarly situated have been chilled because it appears that, in West Virginia, a person can be fired from her position in state government solely because her supervisor believes that she supports a relative who is running for political office.

42. As a direct and proximate result of the unlawful termination of Ms. Smith from her employment as Magistrate Clerk, Ms. Smith has lost and will continue to lose wages and benefits in an amount to be determined by the jury.

43. As a direct and proximate result of the unlawful termination of Ms. Smith from her employment as Magistrate Clerk, Ms. Smith suffered indignity, embarrassment,

humiliation and emotional distress entitling her to damages in an amount to be determined by the jury.

44. As a direct and proximate result of the unlawful retaliation against Greg Smith, Greg Smith has suffered indignity, embarrassment, humiliation and emotional distress entitling him to damages in an amount to be determined by the jury.

Causes of Action

45. By terminating Ms. Smith's employment because her son chose to run for public office, the defendant violated Ms. Smith's rights under the First and Fourteenth Amendments to the United States Constitution, under 42 U.S.C. § 1983, under Article III, §§ 1, 7 and 16 of the West Virginia Constitution, and under the Public Policy of the State of West Virginia.

46. By terminating Ms. Smith's employment in retaliation against Greg Smith because he, Greg Smith, chose to run against the incumbent circuit clerk, the defendant violated the rights of Greg Smith under the First and Fourteenth Amendments to the United States Constitution, under 42 U.S.C. § 1983, under Article III, §§ 1, 7 and 16 of the West Virginia Constitution, and under the Public Policy of the State of West Virginia.

Punitive Damages

47. The termination of Ms. Smith from her employment as Magistrate Clerk because her son, Greg Smith, filed to run for the office of Circuit Clerk was willful, wanton, malicious and undertaken in reckless disregard for the rights of Mary Lou Smith, Greg Smith and others similarly situated entitling Mary Lou Smith and Greg Smith to exemplary or punitive damages in an amount to be determined by the jury.

WHEREFORE, Mary Lou Smith and Greg Smith request relief as follows:

1. Damages for Mary Lou Smith and Greg Smith as set forth above;
2. Exemplary damages against the defendant in an amount to be determined by the jury;
3. Reasonable attorney fees and costs; and
4. Such other relief as may be just and equitable.

Jury Trial Demanded

Plaintiffs demand a jury trial on all issues triable to a jury.

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(2)

No. 07-360

FILED
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

MARY LOU SMITH,

Petitioner,

v.

HONORABLE ANDREW N. FRYE, JR.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether under the First Amendment, *Elrod v. Burns*, 427 U.S. 347 (1976) and its progeny extend to a claim by an at-will state employee, who was dismissed while her son was running for public office, and who alleges that her dismissal was politically motivated even though she did not engage in any protected conduct or otherwise make her political beliefs or her political affiliation known, and the political beliefs and political affiliation of her supervisor, who was detached from the subject political process, were also unknown?

2. Whether in February 2004, the First Amendment associational rights of public employees were clearly established so that a state official should reasonably know that he could not dismiss an at-will employee at a time when her son was running for public office even though the political beliefs and affiliations of the public employee were unknown and there were no facts alleged to support the public employee's belief that the state official's conduct was politically motivated?

3. Whether F.R.C.P. Rule 12(b)(6) requires a federal court to allow a claim to go forward when the plaintiff makes a conclusory allegation that her dismissal was politically motivated but fails to support this theory with any facts, and when assuming the plaintiff has alleged a violation of her First Amendment associational rights, it is clear the defendant is entitled to qualified immunity?

PARTIES TO THE PROCEEDINGS

The Petitioner in this case is Mary Lou Smith. Greg Smith was a party below, but he is not seeking a writ of certiorari. The Respondent is Judge Andrew N. Frye, Jr. who serves as a circuit judge in the Circuit Court of Mineral County, West Virginia.

RULE 29.6 STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondent states that he has no parent companies or non-wholly owned subsidiaries.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Petitioner Mary Lou Smith was formerly employed as clerk of the Magistrate Court of Mineral County, West Virginia, an at-will position in the State's judicial system. She was dismissed by her supervisor, the Honorable Andrew N. Frye, Jr. Nothing in the complaint alleges that, at the time of her dismissal, the political beliefs and affiliations of either or both parties were known. Petitioner's termination occurred while her son was running in the Republican Primary for the office of Clerk of the Circuit Court of Mineral County. Petitioner filed suit in the federal District Court for the Northern District of West Virginia alleging that her termination was politically motivated. In her complaint, Petitioner alleged that Judge Frye, her supervisor, fired her because he believed she supported her son instead of the incumbent circuit clerk, but she offered no factual support for this theory.

The Fourth Circuit decision below discussed the types of fact patterns that are commonly present in political firing cases. And while the Court did not conclude that political firings are strictly limited to these fact patterns, it did find that in all previously reported cases the facts showed at a minimum some rational connection between the political beliefs of one or both parties and the adverse employment action. In the court's opinion, this type of logical inference could not be made in this instance, as the case was almost entirely based on the Petitioner's subjective interpretation of events. Contrary to the Petitioner's assertions, the Fourth Circuit's decision in no way narrows the scope of *Elrod-Branti*, and other applicable precedent regarding the First Amendment associational rights of public employees. In reality, the Fourth Circuit simply

refused to extend *Elrod-Branti* to a case that would require a federal court to invade a state's employment practices on mere speculation.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Smith v. Frye*, 488 F.3d 263 (4th Cir. 2007). The Fourth Circuit's denial of the petition for rehearing and rehearing *en banc* is unreported. The unpublished opinion of the District Court is reported at *Smith v. Frye*, Slip Copy, 2006 WL 4757805 (N.D.W.Va. June 14, 2006).

JURISDICTION

The Court of Appeals denied the petition for rehearing and rehearing *en banc* on June 15, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

> peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

The federal statute under which the Petitioner sought remedy is 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively

to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Pertinent Facts

Mary Lou Smith was formerly employed as Magistrate Clerk of Mineral County, West Virginia. As magistrate clerk, Ms. Smith served at the will and pleasure of the Chief Judge of the Circuit Court of Mineral County. Ms. Smith was dismissed from her position as magistrate clerk by Judge Andrew N. Frye, Jr. Her dismissal occurred shortly after her son filed to run in the primary election for the office of Circuit Clerk of Mineral County. Ms. Smith did not express or otherwise make known her political beliefs or her political affiliation.

Judge Frye approached his judicial colleague, Judge Phillip B. Jordan, Jr. to discuss his concerns that a potential conflict had arisen in the local court system. He expressed to Judge Jordan that the best alternative was to dismiss Ms. Smith. Judge Frye did not discuss or even mention the incumbent circuit clerk. A few days later when he dismissed her, Judge Frye offered Ms. Smith no explanation for her termination.

Following her dismissal, Ms. Smith filed for a personnel hearing under the administrative appeal procedures of the West Virginia judicial system. This hearing was conducted by a senior status judge, the Honorable Robert Chafin. Ms. Smith called eight witnesses during the hearing, including Judge Frye's fellow circuit judge, Phillip B. Jordan, Jr. and prosecuting attorney Lynn Nelson. However, the hearing produced no evidence that

Judge Frye's decision to terminate Ms. Smith was politically motivated. Judge Chafin concluded that Ms. Smith was fired because her son became a candidate for the office of circuit clerk, but this did not violate any state or federal law. This decision was ultimately upheld by the West Virginia Supreme Court of Appeals under its judicial personnel administrative review procedures by an order entered on September 16, 2004, Case No. 04115, and a motion for reconsideration denied on September 30, 2004.

B. Proceedings Before the District Court

Ms. Smith filed suit against Judge Frye in the United States District Court of the Northern District of West Virginia pursuant to 42 U.S.C. § 1983. She claimed that her dismissal violated her rights as guaranteed by the First and Fourteenth Amendments of the United States Constitution.[1] She alleged that she was fired because her son became a candidate in the Republican Primary for the office of circuit clerk. She surmised that Judge Frye believed she supported her son and wanted her to support the incumbent clerk, though this theory was not supported by any factual allegations in the complaint.

Judge Frye moved to dismiss Ms. Smith's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting that Ms. Smith had failed to state a valid claim that her speech and associational rights were violated, and in the alternative that he was entitled to

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[1] Ms. Smith also alleged her rights under Article III, §§ 1, 7 and 16 of the West Virginia Constitution, and under public policy of the State of West Virginia were violated. Upon dismissal of the Petitioner's federal claims, these state law claims were dismissed by the district court without prejudice.

qualified immunity. The district court granted Judge Frye's motion to dismiss. The district court rejected Ms. Smith's "pre-emptive retaliation theory," finding that Ms. Smith had not engaged in any protected speech or conduct, and instead had merely plead that she was the family member of someone running for political office. *Smith v. Frye*, 2006 WL 4757805, Slip Op. at 6-8 (N.D.W.Va. June 14, 2006).

C. Proceedings Before the Fourth Circuit Court of Appeals

Ms. Smith appealed to the Fourth Circuit, claiming the district court erred by failing to consider her freedom of association claim, and basing its decision on her freedom of speech claim. The Fourth Circuit, by a panel majority[2] affirmed the ruling of the District Court.[3] In the Fourth Circuit's view, Ms. Smith had simply not plead facts sufficient to state a claim that her dismissal violated her right to freedom of association.

In reaching its decision, the Court of Appeals reviewed the fact patterns that are commonly found in political firing cases, finding that in previously reported cases there was always some rational connection between the political beliefs, the political affiliations, or both, of one or both

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[2] Judge Motz filed an opinion concurring in part and concurring in the judgment. She opined that Ms. Smith stated a valid claim, but Judge Frye was entitled to qualified immunity.

[3] It would appear that the Petitioner now concedes that there is no valid claim regarding her right to freedom of speech, as she engaged in no expressive conduct or speech. Consequently, only the Fourth Circuit's discussion regarding her association claim is addressed in this response.

parties, and the adverse employment action. Distinct from these cases, Ms. Smith could not make any type of factual connection between her dismissal and Judge Frye's political beliefs. Nor was there any connection between her own political beliefs or affiliation and her dismissal. She had merely plead her theory of why she believed she was fired and nothing more. The Fourth Circuit concluded that *Elrod*, *Branti* and their progeny did not support a claim that required federal courts to make an "inferential leap" rather than a rational connection. "Given the decision-maker's detachment from the political process at play, any conclusion that Judge Frye's decision was intended to punish Ms. Smith for expressive conduct or political affiliation or to compel her conduct or affiliation requires an inferential leap which we are unwilling to make." *Smith v. Frye*, 488 F.3d 263, 271 (4th Cir. 2007).

The Petitioner misconstrues the Fourth Circuit's decision, claiming that the court has now authorized an employer to make a politically based firing before an election, even though the employer could not do the same thing after the election. The Fourth Circuit, however, properly concluded that Ms. Smith had failed to allege any facts that supported her theory of why she was fired – no facts from which to make a rational connection between a political motivation and her dismissal. Despite the Petitioner's contentions, this case cannot be fairly read to suggest that even though Ms. Smith failed to engage in any protected conduct, if there was evidence Judge Frye supported and expected others to support the incumbent clerk her case would still have been dismissed. To the contrary, this is the type of evidence the Fourth Circuit was looking for, but was so glaringly absent from this case.

REASONS THE PETITION MUST BE DENIED

The Fourth Circuit concluded that this case presented a claim to which *Elrod* and *Branti* have never been extended. Unlike previously reported cases, it was not possible to make a rational connection between the political beliefs or the political affiliations of the parties and the adverse employment action. In reality, and as correctly concluded by the Fourth Circuit, the Petitioner had merely plead her perception of why she was dismissed and nothing more.

Therefore, the Fourth Circuit's decision cannot be fairly characterized as restrictive or a departure from precedent. While the court reviewed the fact patterns commonly found in political firing cases, it gave no indication that it was narrowing or limiting First Amendment associational claims to political firings that occur after an election. The Fourth Circuit correctly interpreted the scope of *Elrod*, and simply drew the line at the apposite place under the allegations in this case to prevent federal courts from unnecessarily invading state employment practices based upon nothing more than speculation.

A. Review by this Court Is Not Necessary When the Opinion of the Court of Appeals Is Consistent with All Relevant Precedent.

The Fourth Circuit's decision does not narrow the principles of law established in *Elrod* and *Branti*, and it does not create a blanket exception for pre-election political firings. Fairly read, the court's decision appropriately interprets the scope of a public employee's First Amendment associational rights. The decision was not arbitrarily based on issues of timing, but on the facts alleged, or more

precisely – the total lack of facts presented regarding the Petitioner's First Amendment associational claim. In this regard, the Fourth Circuit's opinion is consistent with all relevant precedent, because like other federal courts, the Fourth Circuit required the Petitioner to present an objective factual connection between her dismissal and an illegal political motivation by her employer.

The general principle of law first adopted by this Court in *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673 (1976) (plurality) is well recognized and widely accepted. The First Amendment prohibits public employees from being terminated solely on the basis of their political beliefs. The only exception to this principle of law was established in *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980). *Branti* provides that public employees can be terminated for political reasons if their position is one that requires their beliefs to conform to that of their employer. 445 U.S. at 515-16 (1980).

In the years that have followed, federal courts have applied the general principles espoused in *Elrod* and *Branti* to cases involving various factual scenarios and circumstances. The Petitioner aptly reviewed a number of these cases that illustrate the breadth of a public employee's political associational rights. Indeed, the Respondent has no quarrel with the basic holdings of the cases cited by the Petitioner. However, these cases offer little to save the Petitioner's claim. Instead, the cases she cites exemplify the point made by the Fourth Circuit. There is simply no objective factual connection between Ms. Smith's dismissal and the political beliefs or affiliations of either party in this action. In each of the cases cited by the Petitioner there is at a minimum some facts or circumstances from which one could at least infer the adverse

employment action was politically motivated. There are objective facts in these cases that, if taken as true, indicated what the political beliefs or affiliations of at least one of the parties were at the time the employee was terminated. In sum, the complaints were based on more than the employee's own perception of events.

It is undisputed at this stage of the proceedings that Ms. Smith did not engage in any conduct or otherwise make her political beliefs or her political affiliation known. There are no allegations regarding Judge Frye's political beliefs either; he was detached from the subject election process and there are no allegations that he ever expressed any opinions regarding the incumbent clerk. The Petitioner's allegation that she was fired because Judge Frye believed she did not support the incumbent clerk is solely her perception of a possible reason for her discharge.

Faced with these speculative factual allegations, the Fourth Circuit reviewed other reported cases involving political firings. The point of this review was not to isolate two sets of facts and circumstances that must be present to state a claim under *Elrod*. As stated above, the court's intention was to demonstrate the objective criteria that have been present in all previously reported cases involving public employee's First Amendment associational rights. This point is well summarized in the court's opinion:

> Indeed, the very differences between the circumstances here and those in the cases within the usual *Elrod* fact patterns suggest that Judge Frye had constitutionally valid reasons for dismissing Ms. Smith. Although we of course accept as true at this stage of the litigation Ms. Smith's allegation that she was fired because Judge Frye

> believed that she supported her son's candidacy rather than that of the incumbent circuit clerk, such an allegation does not necessarily, by itself, state a First Amendment claim under *Elrod*. Rather, Judge Frye's belief that Ms. Smith supported her son's candidacy might have lead Judge Frye to conclude that, in a small office in which Ms. Smith was working with the incumbent circuit clerk, the potential conflict of interest would hinder the efficient administration of the judicial system. It is undisputed that Judge Frye's colleague testified in the state administrative proceedings that Judge Frye expressed those very concerns to him. In the context of at-will employment, such a belief is more than an adequate reason to dismiss an employee. 488 F.3d at 271.

Consequently, it cannot be legitimately concluded that the Fourth Circuit has now sanctioned all pre-election political firings. To the contrary, if there had been any objective evidence that Judge Frye indeed required, or even expected, Ms. Smith to pledge her political support for the incumbent clerk the outcome of this case would have been quite different. In sum, it was the Petitioner's claim that conflicts with years of precedent interpreting *Elrod* and *Branti*, not the Fourth Circuit's opinion.

B. When a Constitutional Right Is Not Clearly Established, Government Officials Are Entitled to Qualified Immunity.

1. The Contours of the Right Alleged by the Petitioner Are Far Afield from Any Reported Case Law Regarding First Amendment Associational Rights.

The doctrine of qualified immunity was established by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct.

2727 (1982). Government officials performing discretionary tasks are properly shielded from civil liability if their actions did not violate any clearly established statutory or constitutional right of which a reasonable person would have known. 457 U.S. at 818 (1982). In subsequent cases, this Court has provided guidance for applying the *Harlow* test, recognizing that in many cases a recitation of a general or widely recognized right will simply not be enough to overcome the defense of qualified immunity.

In *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987), this Court discussed the level of specificity that is necessary for a proper determination to be made that denies a government official the benefit of qualified immunity. The right the official is alleged to have violated must be clearly established, not at its most general level, but rather the contours of the right must be sufficiently clear in order to satisfy *Harlow*'s standard of objective legal reasonableness. 483 U.S. at 639-40 (1980). The level of specificity regarding the right is especially significant in this case and similar cases that are, in reality, an attack on an at-will employment decision. State officials charged with maintaining the operation of offices that deliver vital services to the public must have discretion in employment decisions. Therefore, in maintaining the balance between public duties and private rights they are entitled to particularized findings regarding the constitutional rights of public employees. If only generally plead rights sufficed, the at-will employment rule with respect to public employment would cease to exist.

Plaintiffs should not be able to transform the doctrine of qualified immunity into a rule of pleading by alleging violations of extremely abstract rights. 483 U.S. at 639. This is true because qualified immunity operates "to

ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 1215 S. Ct. 2151 (2001). Ms. Smith has repeatedly stated in her petition to this Court that Judge Frye fired her because he believed she supported her son and not the incumbent clerk. This contention was, however, highly speculative in light of the existing facts and circumstances. The pertinent question in relation to qualified immunity is whether in 2004, Judge Frye should reasonably have known that he could not dismiss an at-will employee whose political beliefs and affiliations were unknown at a time when he was detached from the political process and had expressed no views on the incumbent circuit clerk, simply because the employee's son was running for political office.

A unanimous panel of the Fourth Circuit Court of Appeals concluded that even assuming Ms. Smith had stated a violation of her constitutional rights, Judge Frye was entitled to qualified immunity.[4] In reaching this conclusion, the court recognized that only if the law was applied at its most rudimentary level could one conclude that Judge Frye's actions were unlawful. Indeed, this case presented facts and circumstances (or rather, a lack of facts and circumstances), which have not been found to violate the principles of *Elrod* and *Branti* in any reported case law.

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[4] Judge Motz filed an opinion concurring in part and concurring in the judgment. She concluded that the Petitioner had stated a valid claim, but that her claim was so far removed from any case interpreting *Elrod* and *Branti* that Judge Frye could not have reasonably known that her dismissal violated a clearly established right. *Smith v. Frye*, 488 F.3d 263, 276-77 (4th Cir. 2007) (Motz, D., concurring).

It is certainly reasonable to assume that a government official should know that at-will employees cannot be dismissed solely because of their political beliefs. However, this general principle of law simply does not satisfy the inquiry in this case. To the contrary, it is quite clear that *Elrod* and *Branti* have never been extended to a claim as attenuated as the Petitioner's.

Therefore, to say that Judge Frye should reasonably have known that his conduct was unconstitutional is, in fact, patently unreasonable. At the time of her dismissal, Judge Frye had the authority to dismiss the Petitioner for good reason, bad reason or no reason, as long as the dismissal was not contrary to established law. The political beliefs of both he and Ms. Smith were simply unknown and the complaint is devoid of any connection between the political associations of either of these parties and the discharge. Even assuming Ms. Smith had adequately alleged an associational rights claim, in consideration of all known precedent interpreting *Elrod* and *Branti* at the time, Judge Frye is entitled to qualified immunity.

2. The Petitioner's Contention That the Fourth Circuit's Decision Will Unnecessarily Increase Litigation Is Erroneous and Misinterprets the Opinion.

The Fourth Circuit did not sanction the political firings of public employees if the termination occurs before an election. More to the point, the court did not conclude that the Petitioner's claim failed because no other cases had found pre-election firings to be unconstitutional. Rather, the court concluded, as discussed in the preceding section, that the Petitioner's claim which was based solely on what she believed Judge Frye was thinking was far

afield from any reported case law regarding the First Amendment associational rights of public employees. The facts and circumstances presented in the Petitioner's attenuated allegations plainly did not permit any logical inference that Judge Frye's decision was politically motivated. There were indeed no facts alleged regarding the political affiliations of either party.

Given the dearth of facts alleged by the Petitioner, the Fourth Circuit concluded that it was impossible to conform her claim to any of the reported case law interpreting *Elrod* and *Branti*. The Fourth Circuit did not decide that politically motivated firings can only occur after an election. Rather, the court did observe that firings that occur after an election are more likely to suggest, in conjunction with other facts, that the official actions were politically motivated. If the Petitioner's allegations involved Judge Frye requiring his employees to support the incumbent clerk, or Ms. Smith openly campaigning for her son, the outcome of this case could be quite different, regardless of whether the dismissal occurred before or after the election.

Consequently, there is no legitimate basis to support the Petitioner's dire prediction that an increase in political firing will occur because state officials believe their pre-election political firings are immune from civil liability. In fact, if the Fourth Circuit had found a constitutional violation on the basis of these meager facts, it is more reasonable to assume that every at-will employee fired close in time to an election would attempt to stake a constitutional claim based upon bare allegations about what their employer must have believed. The court acknowledged these very concerns, expressing that approving this case would require a more pervasive intrusion into

the at-will employment relationship between government officials and public employees.

C. The Fourth Circuit Had Two Equally Valid Grounds to Dismiss the Petitioner's Claims Pursuant to Rule 12(b)(6).

In general, the pleading standard under the Federal Rules of Civil Procedure is liberal. However, this does not relieve a plaintiff of the obligation of stating a viable claim. And it is well established under federal law that courts are not required to accept conclusory allegations couched as facts and nothing more when ruling on a motion to dismiss pursuant to Rule 12(b)(6). *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932 (1986). In the same vein: "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1965 (2007).

In paragraph 18 of her original complaint, the Petitioner baldly alleged: "The defendant fired Ms. Smith because her son, Greg Smith, had filed to run against the incumbent Circuit Clerk in the Republican Party primary and because the defendant believed that Ms. Smith supported her son, not the incumbent circuit clerk." This allegation, while presented as a fact, was nothing more than Ms. Smith's perception of why she was fired. There were no factual allegations presented that suggested Judge Frye had an illegal political motivation when he dismissed the Petitioner. There were no facts alleged that even suggested Judge Frye wanted the Petitioner to support the incumbent clerk or even that he in fact supported the incumbent clerk himself. On its face, the

complaint simply did not state a violation of the Petitioner's First Amendment associational rights. Consequently, the Fourth Circuit's affirmance of the district court was well within applicable federal 12(b)(6) standards.

Moreover, even assuming the Petitioner sufficiently alleged a violation of her First Amendment associational rights, it is still beyond any reasonable dispute that Judge Frye is entitled to qualified immunity. As discussed above, while it is well known that a public employee cannot be fired solely on the basis of their political beliefs, this general principle of law was simply not enough to put Judge Frye on notice that he could not legally dismiss the Petitioner. *Elrod* and *Branti* have never been extended to facts as attenuated as those presented by the Petitioner. Therefore, it was within the applicable federal standard for the Fourth Circuit to conclude that Judge Frye was entitled to qualified immunity and to affirm the District Court's dismissal of the Petitioner's claims.

CONCLUSION

For the reasons stated above, the petition should be denied.

Respectfully submitted,

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No. 07-360

IN THE

Supreme Court of the United States

MARY LOU SMITH,

Petitioner,

v.

HONORABLE ANDREW N. FRYE, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONER

Judge Frye does not dispute the importance of the First Amendment issue presented in Mary Lou Smith's Petition but, instead, argues that the decision does not sanction political firings or otherwise limit the *Elrod-Branti* line of cases. He is wrong. The Fourth Circuit's language, holding and analysis restrict the scope of *Elrod v. Burns*, 427 U.S. 347 (1976), and invite district courts in the Fourth Circuit to uphold political firings during electoral campaigns where public employees are fired by someone other than the candidate. Judge Frye is not entitled to qualified immunity upon the facts of this case but, even if he were, the importance of the Fourth Circuit's decision in sanctioning certain politically-motivated firings justifies granting certiorari. Allowing this decision to stand will enable public officials across the country to rely on this case to argue that the law in this area is not clearly established.

Judge Frye also asserts that Ms. Smith fails to allege adequately the basis for her First Amendment claim. However, the Complaint clearly and unequivocally alleges a substantial **factual basis** for her First Amendment claim. App. D, Complaint, 47a-54a. Instead of accepting Ms. Smith's factual pleadings as true, the Fourth Circuit engaged in unwarranted speculation as to constitutionally permissible reasons Judge Frye may have had for firing her even though Judge Frye did not personally offer those reasons when asked to do so at Ms. Smith's administrative hearing.

1. The decision narrows the scope of *Elrod-Branti* as those cases have previously been interpreted

Respondent is plainly wrong when he contends that "the Fourth Circuit's decision in no way narrows the scope of *Elrod-Branti*, and other applicable precedent regarding the First Amendment associational rights of public employees." Response, 1. To the contrary, the decision authorizes a public

official to fire any public employee who supports a candidate other than those candidates favored by the official. The decision does so because it limits the applicability of *Elrod-Branti* to two narrow categories of political firings:

> We are disinclined to disturb that balance on these facts. Judge Frye dismissed Ms. Smith from her at-will employment as magistrate court clerk, a position to which it is unclear *Elrod*'s protections apply, *neither in the heat of his own campaign nor during a victory housecleaning*. We do not find that Ms. Smith alleges a constitutional violation here, and therefore affirm the district court's dismissal of her claims.

App. A, Fourth Circuit decision, 14a-15a, emphasis added. The inclusion of the words "on these facts" may suggest that some other facts might lead to a different result, but given the strength of the facts establishing that Ms. Smith's termination was political in nature it appears unlikely that such a case will arise.

Elrod-Branti and its progeny have long established the principle that public employees are protected from political firings unless the employee is a policymaker or a confidential employee.[1] Ms. Smith is unaware of any decision, prior to the present case, that even implied that political firings are permissible if they are done by a colleague of the candidate, rather than by the candidate himself. Nor has Judge Frye identified any such decisions in his Response. To the contrary, as this Court stated in *Branti*,

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[1] *See* Petition 11 n.12, 23-24 (discussing Judge Frye's failure to raise the confidential/policymaker exception as a defense below and the lack of evidence in the record to suggest that Ms. Smith's position as a magistrate court clerk falls into the *Elrod* exception).

> If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes. Under this line of analysis, unless the government can demonstrate an overriding interest of vital importance requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.

Branti v. Finkel, 445 U.S. 507, 515-516 (1980) (internal citations to *Elrod* omitted).[2] Nothing in the language of *Branti* or its progeny suggests that *Branti* really meant that a public employee's "beliefs" **can** "be the sole basis for depriving him of continued public employment" so long as the person doing the firing is not himself a candidate. Thus, contrary to Judge Frye's contention, the Fourth Circuit's decision creates a significant exception to the well-understood First Amendment prohibition on retaliatory political firings.

In an effort to minimize the significance of the Fourth Circuit's decision, Judge Frye contends that the Fourth Circuit never intended to suggest that its two "archetypes" of *Elrod-Branti* cases were exhaustive. Response, 10. However, the Fourth Circuit's rejection of Ms. Smith's claim rests on its conclusion that her claim falls outside the two categories of *Elrod-Branti* cases: those where the public employee supports a candidate who is running against his employer and those where the employee's employer loses an election and the

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[2]As *Branti* makes clear, the First Amendment also protects Ms. Smith from being fired for her "private beliefs." Thus, Ms. Smith's failure to speak out in support of her son's candidacy prior to her termination is not determinative where she was fired because Judge Frye "believed that Ms. Smith supported her son, not the incumbent circuit clerk." App. D, Complaint, 49a ¶ 18.

victorious candidate fires him as part of a victory housecleaning. App. A, Fourth Circuit decision, 14a-15a (concluding that Ms. Smith was dismissed neither in the heat of Judge Frye's own campaign nor during a victory housecleaning.). *See also, id.* at 10a n.4 (noting that "the lines between the two types of *Elrod* cases are not always bright and distinct," thereby suggesting that there are only two types of *Elrod* cases, *i.e.*, the two archetypes identified by the majority panel); *id.* at 11a (stating that "[a]n assessment of decisions of our sister circuits interpreting *Elrod* reveals the same fact patterns described above").

By focusing on the factual scenarios in which *Elrod-Branti* cases historically arise, the Fourth Circuit created categories based on who did the firing and when the firing occurred instead of focusing on whether the employer acted with the prohibited political animus. App. A, Fourth Circuit decision, 13a (distinguishing Judge Frye from the public official in *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000) because "Judge Frye was not himself seeking office and terminating those who did not support his candidacy" when, in fact, Judge Frye and the public official in *Knight* both had the motive and intent to fire an employee because of her support for a particular candidate).[3] As a result, the Fourth Circuit failed to realize that Ms. Smith's case strikes at the very core of the First Amendment: she was fired precisely because a powerful local public official, the Chief Judge, believed that she supported her son's candidacy against the incumbent circuit clerk in the upcoming primary election. As this Court explained in *Elrod*, "political belief and association constitute

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[3]Even a more generous reading of the Fourth Circuit's opinion is seriously wrong because the two archetypes it discusses do not define the core of the right. The litigated cases often tend to be those at the periphery of the right where there may be reasonable arguments that the Constitution has not been violated.

the core of those activities protected by the First Amendment" and "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, ..." 427 U.S. at 356 (internal citations omitted). The Fourth Circuit's decision, if allowed to stand, undermines the electoral process by allowing public officials to be the arbiters of what shall be orthodox in electoral politics.

The decision not only gives non-candidate public employers the right to fire employees who are believed to support a disfavored candidate or faction, but it also greatly extends the cloak of qualified immunity for politically-motivated firings. The impact of the decision is not restricted to the Fourth Circuit but will extend across the United States as public employers can now rely on it to argue that they are entitled to qualified immunity because the law protecting public employees in Ms. Smith's position is no longer "clearly established." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982) (explaining that "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful").

Finally, Judge Frye is not entitled to qualified immunity where, by his own admission, "[i]t is certainly reasonable to assume that a governmental official should know that at-will employees cannot be dismissed solely because of their political beliefs." Response, 14. As Judge Frye surely knows, firing a public employee because she supports the wrong candidate or fails to support the right candidate is as much a violation of the First Amendment as firing her because of her particular political beliefs. *See generally*, Petition, 14-17 (collecting cases recognizing that the First Amendment protects the rights of public employees to support particular candidates or political factions within the same party). Thus, Ms. Smith was not required to identify either her political beliefs or those of Judge

Frye to overcome Judge Frye's defense of qualified immunity as she clearly alleged that Judge Frye retaliated against her because of her son's political candidacy.

2. Petitioner has clearly alleged sufficient facts to survive a Rule 12(b)(6) motion to dismiss

Throughout his Response, Judge Frye mistakenly contends that Ms. Smith has offered no factual support for her allegations that she was fired by Judge Frye in retaliation for her son's candidacy in opposing the incumbent circuit clerk in the Republican primary. *See* Response, 1 (asserting that petitioner "offered no factual support" for her contentions); *id.* at 2 (characterizing Ms. Smith's case as "mere speculation"); *id.* at 7 (arguing that Ms. Smith failed to "make any type of factual connection between her dismissal and Judge Frye's political beliefs"); *id.* at 15 (referring to a "dearth of facts" and "meager facts"). Thus, according to the respondent, the Fourth Circuit's decision simply stands for the proposition that a public employee must allege more than "bare allegations about what their employer must have believed." Response, 15.

This characterization of the Complaint is plainly wrong and misleading. It is difficult to imagine a more compelling series of allegations in a complaint. Ms. Smith's Complaint identifies precisely the types of evidence upon which courts rely in inferring a retaliatory motive and demonstrates a clear connection between her son's candidacy for public office and her termination. *See* App. D, Complaint, 47a-54a. Specifically, Ms. Smith has alleged that: (1) a close familial relationship existed between herself and the candidate for public office;[4] (2) there was a close proximity in time between

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[4]App. D, Complaint, 48a at ¶¶ 4,5 (alleging that Greg Smith, the political candidate, is Ms. Smith's adult son). Given that Judge Frye knew of the close familial relationship between the petitioner and the candidate, it is not speculative to infer that Judge Frye

her son's filing to run for public office and her own termination;[5] (3) on the day Greg Smith filed to run for office, Judge Frye stated that he wanted to fire Ms. Smith because of her son's candidacy;[6] (4) Judge Frye was angry at Ms. Smith

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believed that Ms. Smith supported her son's candidacy over that of the incumbent circuit clerk even in the absence of any action by Ms. Smith demonstrating support for her son.

[5]App. D, Complaint, 48a-49a at ¶¶ 10, 17 (alleging that on January 30, 2004, Greg Smith filed to run for the position of circuit clerk and his mother was fired shortly thereafter on February 5, 2004). Courts have generally recognized that temporal proximity is evidence of a causal connection between protected activity and an adverse employment action. *See, e.g., Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (noting that "cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close'"); *Culver v. Gorman & Co.*, 416 F.3d 540, 546 (7th Cir. 2005) (observing that "[s]uspicious timing is thus 'often an important evidentiary ally of the plaintiff'").

[6]App. D, Complaint, 48a-49a at ¶ 12 (alleging that on January 30, 2004, Judge Frye learned that Greg Smith had filed to run for the position of circuit clerk and told his judicial colleague, Judge Jordan, that he wanted to fire Ms. Smith because of her son's candidacy). In addition to the issue of timing, Judge Frye even announced his intention to fire Ms. Smith for this exact reason. Such statements are highly probative of an employer's motive in firing an employee. *See Campos v. City of Blue Springs*, 289 F.3d 546 (8th Cir. 2002) ("Direct evidence of discrimination may include evidence of remarks or comments which indicate discriminatory animus on the part of those with decision making authority.").

because of her son's candidacy;[7] (5) there were no complaints about Ms. Smith's work performance to support any other motive for her firing;[8] (6) Judge Frye, when asked why he fired Ms. Smith, stated that he did not have a reason for terminating her employment;[9] and (7) Judge Frye lied about the timing of his decision to terminate Ms. Smith.[10]

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[7]App. D, Complaint, 49a at ¶ 13 (alleging that, at the time Judge Frye told Judge Jordan that he intended to fire Ms. Smith, he was angry at Ms. Smith because of her son's candidacy).

[8]App. D, Complaint, 49a at ¶¶ 14, 15 (alleging that neither Judge Frye nor anyone else with whom Ms. Smith worked had ever expressed any concerns about Ms. Smith or her work performance).

[9]App. D, Complaint, 50a at ¶ 26 (alleging that when Judge Frye was asked at the grievance hearing "why he fired Ms. Smith he did not provide a reason for his decision, insisting, instead, that he did not have a reason or a motive for his decision to fire her"). Failure to proffer a credible reason for the discharge permits an inference that the reason is pretextual. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 147 (2000) ("Once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."). Here, Judge Frye proffered no justification for his decision at all.

[10]App. D, Complaint, 50a-51a at ¶¶ 27-28 (alleging that Judge Frye's claim that he had requested a model termination letter from the Administrative Office of the Supreme Court 3 to 4 weeks before firing Ms. Smith was discredited by the testimony of the Interim Director of the Administrative Office who stated that Judge Frye did not speak to him about firing Ms. Smith until February 4, 2004, the day before she was fired). The use of inconsistent rationalizations for an adverse employment action can lead to an inference of an illegal motive. *See, e.g., Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) (holding that "weaknesses, implausibilities,

Furthermore, Ms. Smith specifically alleged that Judge Frye fired her because of her son's candidacy against the incumbent circuit clerk and because he believed that she supported her son in that contest. App. D, Complaint, 49a at ¶ 18. She also pled that the hearing officer who heard her internal administrative appeal concluded that she would not have been discharged from her judicial employment on February 5, 2004, if her son had not become a candidate for circuit clerk." ¶ 29. Thus, the Complaint clearly alleges a direct causal connection between Greg Smith's candidacy for public office and his mother's termination six days later such that Ms. Smith's claim is not based on "mere speculation."

Judge Frye is also incorrect when he suggests that the Fourth Circuit would have ruled differently if Ms. Smith had been "campaigning for her son." Response, 15. The First Amendment protects political affiliations and privately held beliefs, not just the right to campaign actively on behalf of a candidate. *See* discussion 3, *supra*.

The decision below also provides a textbook example of what a court is **not** supposed to do in ruling on a Rule 12(b)(6) motion to dismiss. Rather than assuming that the plaintiff could prove what she alleged, the court below engaged in unwarranted speculation as to what innocent reasons, such as concern about a conflict of interest, Judge Frye could have had for firing Ms Smith. In doing so, the Fourth Circuit disregarded the fact that Judge Frye, when offered the opportunity to explain the reason for his decision to fire Ms. Smith, did **not** claim that he had fired her because he was concerned about a potential conflict of interest in the local

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inconsistencies, incoherencies, or contradictions" in an employer's proffered legitimate reasons for its action can create an inference that the employer did not act for the proffered reasons).

judicial system. *See* Petition, 26-28 (discussing the inappropriateness of the panel majority's speculations).

The appropriate standard for evaluating a Rule 12(b)(6) motion to dismiss was recently summarized in *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S. Ct. 1955 (May 21, 2007):

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).

Twombly, 127 S.Ct. at 1964-65 (citations omitted). As Judge Motz's separate opinion cogently demonstrated, Ms. Smith's allegations were more than sufficient to survive a Rule 12(b)(6) motion to dismiss. Ms. Smith's complaint did not contain a mere "formulaic recitation of the elements of a cause of action," but set forth, in detail, the plausible grounds for her First Amendment claim that Judge Frye's termination of her employment was politically-motivated in retaliation for her son's candidacy and his belief that she supported her son's candidacy over that of the incumbent circuit clerk. On the facts as pled, any *other* explanation would be implausible.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

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October 30, 2007